BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT

QUESTION PRESENTED

Whether principles of res judicata and comity, as embodied in 28 U.S.C. § 1738, prevent relitigation in federal court, under Title VII of the Civil Rights Act of 1964, of an employment discrimination claim adversely disposed of by a final judgment of a New York state court.[1]

[1] Respondent, Chemical Construction Corporation, is a wholly-owned subsidiary of Aerojet-General Corporation, which, in turn, is a wholly-owned subsidiary of The General Tire and Rubber Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-6045

RUBIN KREMER,

Petitioner,

-v-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. The Proceedings Below

On June 2, 1980 the Court of Appeals for the Second Circuit unanimously affirmed[2] the dismissal by the District Court for the Southern District of New York of petitioner's action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1976), because of the preclusive effect of a New York appellate court judgment which had rejected the identical employment discrimination claim made by petitioner under the New York Human Rights Law.[3]

[2] The decision of the Court of Appeals is reported at 623 F.2d 786 (1980) and appears at page 69 of the Joint Appendix. Subsequent references to the Joint Appendix will be cited as "J.A.".

[3] The Court of Appeals subsequently denied both Mr. Kremer's petition for rehearing and his suggestion for rehearing *en banc*. (J.A. 79, 80)

Shortly after this case was filed in the District Court on July 14, 1978, respondent, Chemical Construction Corporation ("Chemico"), moved, pursuant to Rule 12, F.R.Civ.P., for dismissal, or alternatively for summary judgment, on the ground that petitioner was precluded by principles of res judicata and collateral estoppel and by 28 U.S.C. §1738 from relitigating the identical claim of unlawful employment discrimination previously litigated unsuccessfully by him against Chemico before the New York Division of Human Rights and a New York state court. (J.A. 39) The District Court denied Chemico's motion on December 7, 1978, but following the Second Circuit's decision in *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979) ("*Sinicropi*"), reconsidered Chemico's motion, granted it, and dismissed the action.[4]

On appeal, the Second Circuit, declining petitioner's invitation to reconsider *Sinicropi*, affirmed. (J.A. 69); 623 F.2d 786 (1980). This Court granted certiorari on June 22, 1981.[5] (J.A. 81)

B. Petitioner's Employment by Chemico[6]

In early 1973, petitioner, a 53-year old Jewish emigre from Poland, applied for employment with Chemico as a piping engineer. Chemico hired him. (J.A. 9) His performance ratings

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[4] The opinion of the District Court granting Chemico's motion to dismiss is reported at 477 F.Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.) and appears at J.A. 55; the District Court's order dismissing the complaint appears at J.A. 68; the prior opinion of the District Court denying Chemico's motion is reported at 464 F.Supp. 468 (S.D.N.Y. 1978) (Pierce, J.) and appears at J.A. 43.

[5] The greater part of the opinion of the Court of Appeals was devoted to discussion of petitioner's argument that *Sinicropi* should not have been applied "retroactively" to preclude his claim. The Court of Appeals rejected this contention, and this Court excluded the "retroactivity" question from its grant of certiorari.

[6] Because petitioner has attacked the state administrative proceedings at issue here as "perfunctory at best" (Pet. Brief, p. 3) but, nonetheless, over Chemico's objection, refused to print in the Joint Appendix any but a few pages from the record of those proceedings which petitioner himself filed in the District Court, Chemico has printed additional parts of that record in the Supplemental Appendix to this brief. Reference to the Supplemental Appendix will be cited as "S.A.". For the same reason, Chemico describes the prior administrative and judicial proceedings in greater detail than would normally be necessary in a res judicata case.

during two years of work at Chemico were mediocre to "below average". (S.A. 26, 37) On August 1, 1975, he and other employees were laid off. (J.A. 9)

Three weeks later petitioner sent a letter to Chemico's President complaining that his layoff was the "result of a long time period of conspiracy" by two fellow employees and characterizing his supervisor as "a tool of power". (S.A. 3) Then, beginning in November, 1975, petitioner sent to Chemico and one of its affiliates at least five applications seeking re-employment (S.A. 13-20), exchanged additional letters with Chemico's Vice President of Employee Relations and had several conversations with officials of the company to discuss his grievances concerning the "conspiracy" against him by fellow employees. (S.A. 5, 6, 33, 48) In none of these communications—which continued for more than a year—did Mr. Kremer claim that his discharge or Chemico's failure to rehire him was due to any of the unlawful grounds asserted in his Title VII suit.

C. Petitioner's Proceeding Before the New York Division of Human Rights

Petitioner's first claim of discrimination against Chemico came in a "Charge of Discrimination" filed by him with the United States Equal Employment Opportunity Commission ("EEOC") on May 6, 1976. (J.A. 5) In filing his "Charge of Discrimination", Mr. Kremer completed a form prepared and supplied by the EEOC, near the top of the first page of which, under the heading "Cause of Discrimination", he placed "X's" in two boxes labelled "Religious Creed" and "National Origin". Under the heading on the form directing him to "explain what unfair thing was done to you" petitioner wrote out a lengthy recital of his grievances. Except for brief allusions to his belief that prior to his termination Chemico had not utilized his talents productively, petitioner's grievances concerned almost exclusively Chemico's refusal to rehire him when it had hired or rehired three individuals, Parish Shah, Nevin Shah and Tapan Banerjee. (J.A. 8) Nowhere in that narrative of his claim did petitioner charge Chemico with *any* discriminatory conduct based upon either his religious creed or national origin.

Upon receiving petitioner's charge, and as required by Title VII and by its own regulations, the EEOC deferred action upon it for 60 days and referred petitioner and his claim to the New York State Division of Human Rights (the "NYHRD"), the state administrative agency charged with enforcing the New York Human Rights Law and with adjudicating claims arising under it.

Pursuant to the deferral scheme of section 706 of Title VII, 42 U.S.C. § 2000e-5, the EEOC has designated the NYHRD as a "706 Agency", to which the EEOC has determined it appropriate to refer claims arising under Title VII. Under the EEOC's regulations, it was authorized to designate the NYHRD as a deferral agency, and to continue that designation in effect, only after examining New York's anti-discrimination laws and the NYHRD's rules, regulations and interpretative guidelines[7] and after rendering a determination as to the NYHRD's

> willingness and ability to administer its law in such a manner that, in fact, the practices prohibited are comparable in scope to those practices prohibited under Federal law . . .

and that

> [i]n all cases where the 706 Agency finds cause to credit the allegations of the charge, it shall effectively eliminate the discrimination and, where State or local law allows, provide for full compensation and prospective relief consistent with applicable Federal law.

29 C.F.R. §1601.12(j) and (j)(1) (1975), reprinted at S.A. 60.

When the EEOC has determined that a state administrative body qualifies as a "706 Agency" and after issuing the appropriate designation, section 706 requires the EEOC to defer action upon a private claimant's Title VII charge for 60 days.

Petitioner filed a complaint with the NYHRD on May 20, 1976 (J.A. 9), charging Chemico with "an unlawful discrimina-

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[7] 29 C.F.R. § 1601.12(c),(f), & (j) (1975), reprinted at S.A. 59-60.

tory practice relating to employment in violation of Article 15 of the Executive Law of New York".[8] Upon the filing of a complaint, the NYHRD was required to undertake a prompt investigation to determine whether there was probable cause to believe that the alleged discrimination had occurred.[9] In conducting its investigation, the NYHRD must afford a complainant a full and fair opportunity to present evidence on the record in support of his claim. Under the NYHRD's procedures, a claimant may offer his own testimony, that of other witnesses, and may submit exhibits. The NYHRD is empowered to interview the respondent's witnesses, as well as a claimant's, and to require the respondent to reply to the charge and to produce documentary evidence.[10] A *pro se* claimaint, moreover, may request the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents.[11] Although the NYHRD specifically advised him of his right to do so, petitioner called no witnesses to testify on his behalf before the NYHRD, submitted no list of witnesses, and requested the issuance of no subpoenas. (S.A. 1)[12]

Chemico submitted documentary evidence to the NYHRD, including petitioner's personnel files and the names, ages, and periods of service of its Jewish and other employees. Petitioner was afforded an opportunity by the NYHRD to examine and to respond in writing to all these documents produced by Chemico.

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[8] N.Y. Human Rights Law §296(1)(a), N.Y. Exec. Law §296 (1)(a) (McKinney Supp. 1972-1980), reprinted at S.A. 61.

[9] N.Y. Exec. Law §297(2) (McKinney 1972), reprinted at S.A. 61.

[10] *See, State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Comm.*, 59 A.D.2d 332, 399 N.Y.S.2d 541, 543-44 (1977); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970); *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265, 270 (2d Cir. 1977) ("*Mitchell*"), and discussion at pp. 16–17, *post*.

[11] The NYHRD's regulations provide that: "Subpoenas and subpoenas *duces tecum* may be issued by the designated division officers and employees upon the application of a party or a party's attorney". Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.12(c) (1977), reprinted at S.A. 64; see *id.*, §465.10 (1975), cited in *Mitchell, supra*, 553 F.2d at 271 n. 7.

[12] The NYHRD also advised petitioner on two separate occasions of his right to be represented by counsel. (S.A. 1, 66)

(S.A. 1, 7, 44, 45) He did both. (S.A. 34, 35, 36, 37, 38, 39, 40, 41, 42, 43) In addition, he met on at least two occasions with officials of the NYHRD to argue his case orally and to discuss and rebut the responses and documents filed by Chemico. (S.A. 68, 71)[18] He also met with the NYHRD's Regional Director and stated his case to him. (S.A. 45)

Following its investigation into petitioner's charge and its review of the documents produced by Chemico and of petitioner's arguments and responses thereto, the NYHRD issued a "Determination and Order After Investigation" on April 28, 1977 (the "Determination and Order"), finding there to be "no probable cause to believe that the respondent engaged in or was engaged in the unlawful discriminatory practice complained of." (J.A. 13) It based its ruling upon its determination that:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.

Id.

The NYHRD thereupon dismissed petitioner's complaint. *Id.*

D. Petitioner's Proceeding Before the Appeal Board

Although not required to do so in order to pursue his Title VII claim, Mr. Kremer appealed the NYHRD's Determination and Order to the New York State Human Rights Appeal Board (the

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[18] The only evidence in the record to support petitioner's assertion (Pet. Brief, p. 4) that at one of these sessions a NYHRD representative aborted his effort to examine the documents by saying "Read faster, I have to go for lunch" is a letter submitted by petitioner to the EEOC more than a year later. (S.A. 69) In that same letter, which petitioner excluded from the Joint Appendix, he stated that, at that same meeting with NYHRD, "I verbally refuted all the respondents statements entirely and demonstrated with documents that they are untrue and false" and cited the portions of the record containing those "refutations." (S.A. 68)

"Appeal Board") on May 10, 1977. In his appeal he argued that Chemico had discriminated against him and that the NYHRD had failed to give him an adequate and procedurally fair hearing. (S.A. 8–11) In addition, petitioner—for the first time—submitted a list of witnesses whom he wished to call to testify on his behalf. (S.A. 12) These witnesses, who could have been heard at the NYHRD level, were not able to testify before the Appeal Board—which, as an appellate body, lacked authority to hear testimony.

The Appeal Board is an adjudicatory authority within the Executive Department and is independent of the NYHRD. N.Y. Exec. Law §297-a(1) (McKinney Supp. 1972-80), reproduced at S.A. 61; *Mitchell* v. *National Broadcasting Co.*, 553 F2d 265, 267 n.4 (2d Cir. 1977) ("Mitchell"). Its decisions are final and binding on the NYHRD, except as they are modified upon further appeal. N.Y. Exec. Law §297-a(7) (McKinney 1972).[14]

On September 16, 1977, after submitting his arguments in writing (S.A. 8–11), petitioner appeared before the Appeal Board and orally argued his case. (*See* J.A. 15) On November 25, 1977, after reviewing the record, the Appeal Board affirmed the Determination and Order of the NYHRD. (J.A. 16)

E. Petitioner's Proceeding in the Appellate Division

After the Appeal Board had affirmed the NYHRD's dismissal of his charge, petitioner had several options available to him. He had already pursued his state administrative remedies far longer

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[14] The scope of the Appeal Board's review is limited to determining:
whether the order of the division is:
a. *in conformity with the constitution and the laws of the state and the United States;*
b. within the division's statutory jurisdiction or authority;
c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;
d. supported by substantial evidence on the whole record, or
e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
N.Y. Exec. Law §297-a(7) (emphasis added).

than required by Title VII,[15] and, with his appeal to the Appeal Board, he had exhausted those remedies. At this point, Mr. Kremer did return to the EEOC—on December 4, 1977—to urge it to take up his claim. (J.A. 18) Two days later, however, he embarked upon a second course of action which the Court of Appeals found to be of controlling significance. He decided to step outside the EEOC and state administrative framework of Title VII by instituting a judicial proceeding in the Appellate Division of the New York Supreme Court (the "Appellate Division") for review of the order of the Appeal Board. (J.A. 23) The Appellate Division, of course, is not a "706 Agency". Rather, it is the second highest court in New York, empowered with general jurisdiction over appeals from trial level courts and with jurisdiction over special proceedings relating to administrative agency actions.[16] Mr. Kremer's petition in the Appellate Division asserted that his appeal was taken pursuant to both section 298 of the Human Rights Law[17] and Article 78, N.Y. Civ. Prac. Law §7801 *et seq* (McKinney 1981).[18]

Under section 298 of the Human Rights Law, the Appellate Division has authority to enforce, modify or set aside the order appealed from. N.Y. Exec. Law §298, reprinted at S.A. 62-63. It may also remit a case to the NYHRD for further proceedings if

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[15] The 60-day deferral period had expired on July 19, 1976, before the NYHRD had acted on his claim and more than a year before the Appeal Board upheld the NYHRD's determination in November of 1977. Petitioner was free at any time after July 19, 1976 to return to the EEOC to press his claim.

[16] N.Y. CONST. Art. 6, §§4(k), 5(a) (1961); N.Y. CIV. PRAC. LAW §7804(g).

[17] In an appeal to the Appellate Division from a decision of the Appeal Board, Section 298 of the N.Y. Human Rights Law, N.Y. EXEC. LAW §298 (McKinney 1972), provides, *inter alia*, that:

> Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . .

[18] An Article 78 proceeding is New York's general procedure for review of administrative and judicial actions and encompasses requests for relief formerly obtained by writs of certiorari, mandamus and prohibition. (N.Y. CIV. PRAC. LAW §7801)

it finds that the investigation was procedurally inadequate or that specified evidence should have been adduced, but was not. *E.g., Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d 746 (1981); N.Y. Exec. Law §298. An order of the Appellate Division, however, unless appealed to the New York Court of Appeals, is final and binding and constitutes a "judgment . . . determining the rights of the parties" under N.Y. Exec. Law §298 and N.Y. Civ. Prac. Law §411 (McKinney 1972).[19]

Before the Appellate Division, petitioner argued that Chemico had discriminated against him, that the proceedings before the NYHRD had not afforded him an adequate and procedurally fair hearing, and that specified evidence had not been adduced. (J.A. 23-4; S.A. 51—57).

The issues were briefed before the Appellate Division by both parties and the full certified record of the administrative proceedings before the NYHRD and the Appeal Board was submitted to the Appellate Division by the NYHRD's General Counsel.[20] (See S.A. 31) On February 27, 1978, following review of all of the parties' submissions and of the certified record of the proceedings below, the five-member court unanimously ordered that "the determination of the respondent, the State Human Rights Appeal Board be, and the same hereby is, confirmed. . . ". (J.A. 25) Petitioner did not seek to appeal the order of the Appellate Division to the New York Court of Appeals, although he was entitled to do so by section 298 of the Human Rights Law.

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[19] N.Y. EXEC. LAW §298 provides, *inter alia*, that

> [t]he jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding.

N.Y. CIV. PRAC. LAW §411 provides: "The court shall direct that a judgment be entered determining the rights of the parties to the special proceeding."

[20] For a discussion of the role of the NYHRD's attorneys in proceedings before the Appeal Board and the Appellate Division see *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 68–70 (1980).

F. Petitioner's Final Proceedings Before the EEOC

Shortly after the Appellate Division affirmed dismissal of petitioner's state proceeding, the EEOC rendered its determination. On May 11, 1978, after reviewing the full record of all the prior proceedings, it found that "[t]here is not reasonable cause to believe that the charge is true" and issued petitioner a "right to sue letter". (J.A. 27) Petitioner then filed a request for reconsideration. On June 27, 1978 the EEOC denied that request in a letter of the District Director which indicated that he had personally reviewed the case file, had spoken at length with the investigator, particularly as to the points complained of by petitioner, and had concluded that the determination of no probable cause was appropriate and correct in all respects. (S.A. 49) Mr. Kremer then commenced this action in the District Court. Annexed to his complaint (J.A. 36) were copies of portions of the record compiled in his prior administrative and judicial proceedings.

SUMMARY OF ARGUMENT

Although required to do so neither by Title VII nor by New York's Human Rights Law, petitioner appealed to the Appellate Division from the NYHRD's dismissal of his complaint. The Appellate Division's resulting affirmance was a final judgment on the merits—binding under state law—and, therefore, entitled to full faith and credit so as to bar petitioner's subsequently instituted Title VII action in federal court. 28 U.S.C. § 1738 (1976); *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980).

The appellate review obtained by petitioner from New York's second highest court is a guarantee that the NYHRD's determination to dismiss his complaint was arrived at in a procedurally fair manner. Were there any basis to his claim that the NYHRD acted arbitrarily and in an unfair and perfunctory manner, the Appellate Division was fully empowered—and obligated under the laws and constitutions of New York and of the United States—to correct those alleged defects. That the Appellate Division, which regularly exercises its power to police agency determinations in favor of complainants situated similarly to petitioner, found no defects in the NYHRD's procedure can only mean that Mr. Kremer was afforded a full and fair opportunity to be heard before the agency dismissed his complaint. To refuse to accord binding effect to the Appellate Division's judgment would be to hold that New York's

courts are presumed to be unable or unwilling to ensure the fundamental fairness of the procedures employed by the agencies whose actions they are charged with reviewing. This Court has repeatedly declined to indulge any such presumption. *Trainor* v. *Hernandez*, 431 U.S. 434, 444 (1977); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Stone* v. *Powell*, 428 U.S. 465, 493-94 n. 35 (1976); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

Nor do Title VII's "unique" enforcement scheme and "high priority" work an implied repeal of 28 U.S.C. §1738, enacted by the first Congress in 1790, or of principles of repose and comity which have long been recognized by Congress and this Court. *Allen* v. *McCurry*, *supra*, establishes that, despite their unquestionably extraordinary importance, the Reconstruction Era civil rights statutes do not impliedly derogate from the binding nature of a state court's judgment. There is nothing in Title VII's wording or legislative history to suggest a different result in this case. Indeed, unlike 42 U.S.C. § 1983 (1976), Title VII was *not* enacted because of the perceived hostility of state officials and courts to the vindication of federal rights. Rather, Title VII, in requiring a limited deferral to existing state administrative remedies, bespeaks a confidence in state procedures which is wholly compatible with those notions of comity and federalism which are embedded in 28 U.S.C. § 1738.

Finally, sound public policy mandates that state court review of state agency determinations be accorded binding effect by federal courts. A contrary result would only demoralize and render ineffective state systems which, as contemplated by Title VII, work in tandem with existing federal forums to eliminate invidious employment discrimination.

ARGUMENT

Principles of Preclusion and Federalism Bar Relitigation in a Federal Court, Under Title VII, of a Claim of Employment Discrimination Adversely Disposed of by a Final State Court Judgment.

INTRODUCTION

Petitioner Rubin Kremer's charge of discrimination was dismissed for lack of probable cause by the NYHRD. After unsuc-

cessfully pursuing an administrative appeal to the Appeal Board, petitioner made a critical choice: he elected to press an appeal to the Appellate Division of the Supreme Court—New York's second highest court. The Appellate Division's resulting affirmance of the agency's action was a final judgment, on the merits, entitled to binding effect under New York law. N.Y. Exec. Law §298; N.Y. Civ. Prac. Law §411; *see: Reilly* v. *Reid*, 45 N.Y.2d 24, 27, 379 N.E. 2d 172, 407 N.Y.S.2d 645, 646 (1978); *Mitchell, supra*, 553 F.2d at 273; *Taylor* v. *New York City Transit Authority*, 433 F.2d 665, 668 (2d Cir. 1970).

By operation of common law and 28 U.S.C. §1738, that state court judgment was entitled to be accorded preclusive effect by the federal courts.[21] *Allen* v. *McCurry, supra*, 449 U.S. at 96. Accordingly, both the District Court and the Second Circuit correctly held that Mr. Kremer's Title VII action was barred by virtue of the Appellate Division judgment.[22] In so doing, the courts below not only heeded conventional res judicata concerns (the need for repose and finality, the avoidance of repetitious litigation, and the prevention of inconsistent results, thereby fostering reliance on adjudication), but also "promote[d] the comity between state and federal courts that has been recog-

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[21] 28 U.S.C. §1738 (1976) provides in pertinent part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[22] The Second Circuit based its affirmance squarely upon *Sinicropi, supra*, which it declined to reconsider. *Sinicropi* was based upon *Mitchell, supra*, which held that a determination of the NYHRD, after an investigation but without a hearing, finding no probable cause was, if appealed to the New York state courts, entitled to res judicata effect so as to bar a subsequent federal suit under 42 U.S.C. §1981.

In *Mitchell* the Second Circuit carefully analyzed the fairness of New York's administrative scheme and found that the dismissal of a complaint by the NYHRD meant that, as a matter of law, the complaint was devoid of merit. This, the Second Circuit reasoned, offered a complainant protection comparable to that afforded a federal court litigant under Rules 12(b) and 56 of the Federal Rules of Civil Procedure. 553 F.2d at 270-71. Moreover, review by the Appellate Division ensured that the NYHRD had proceeded fairly in dismissing complaints. *Id.* at 272 n. 9.

nized as a bulwark of the federal system". *Allen* v. *McCurry*, *supra*, 449 U.S. at 96.

Petitioner contends that, because Title VII suits are entitled to the "highest priority" (Pet. Brief at 7), this Court should fashion an exception to the rule—which has been the law since the first Congress met in 1790—that federal courts normally are required to accord preclusive effect to state court judgments. *See* 28 U.S.C. §1738. Petitioner advances three arguments in support of his contention that he was entitled to a de novo adjudication in a federal court of the employment discrimination claim which was rejected by New York's agencies and appellate court. First, petitioner complains that, because the New York judgment was arrived at in a "perfunctory", unfair manner, it is not entitled to the deference normally accorded state court judicial proceedings by federal courts. Second, petitioner claims that it is a policy of Title VII to guarantee each claimant a de novo factfinding by a federal court and that this policy is strong enough implicitly to override the considerations of repose, comity, and federalism which would otherwise interdict the relitigation in a federal forum of a claim turned down by a state court. Third, mindful of the overweaning importance of the interests served by the preclusion doctrine, petitioner contends that denying binding effect to the Appellate Division's judgment would actually enhance, rather than derogate from, principles of comity and federalism.

These contentions will be discussed *seriatim*.

I. Appellate Division Review of the Administrative Disposition of Employment Discrimination Claims Guarantees the Fairness of the State Procedure

Res judicata is properly invoked whenever a party seeks to relitigate a claim which has previously been decided against him by a court of competent jurisdiction. *Federated Department Stores, Inc.* v. *Moitie*, ___ U.S. ___, 101 S.Ct. 2424, 2427 (1981); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877). Similarly, collateral estoppel precludes relitigation, by the same party, of issues previously decided against him, provided that he had a "full and

fair opportunity" to litigate those issues in the earlier adjudication. *Cf., Montana* v. *United States*, 440 U.S. 147, 153 (1979).

Petitioner asserts that he "had no opportunity at all to raise the issue of Chemico's discriminatory conduct in state court." (Pet. Brief, p. 11). This assertion is entirely incorrect, since in affirming the NYHRD's dismissal of petitioner's complaint the Appellate Division necessarily decided that petitioner had not been denied any of the procedural rights to which he was entitled, and that his "complaint lacks merit as a matter of law."[23] And, of course, judicial affirmance of an administrative determination is entitled to preclusive effect be it as a matter of res judicata or collateral estoppel. *See: CIBA Corp.* v. *Weinberger*, 412 U.S. 640, 644 (1973); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 476 (1952); *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339 (1945); *Grubb* v. *Public Utilities Comm'n of Ohio*, 281 U.S. 470, 475 (1930); *Napa Valley Electric Co.* v. *Board of Railroad Com'rs*, 251 U.S. 366, 370-72 (1920); *In re Federal Water & Gas Corp.*, 188 F.2d 100, 104 (3d Cir.), *cert. denied*, 341 U.S. 953 (1951).[24]

Compelled to acknowledge the identity of the parties to and issues raised in the state and federal proceedings (Pet. Brief, p.

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[23] *See, Flah's Inc.* v. *Schneider*, 71 A.D.2d 993, 420 N.Y.S.2d 283, 284 (1979), and *post* pp. 18 to 25; *cf. Angel* v. *Bullington*, 330 U.S. 183, 190 (1947) ("The 'merits' of a claim are disposed of when it is refused enforcement.").

[24] It is asserted at page 19, n. 20 of the Government's brief that only collateral estoppel and not claim preclusion can apply here because, according to the Government, petitioner's Title VII claim was not and could not have been before the NYHRD. While the distinction is important in other contexts, it is of no practical significance in this case: dismissal of petitioner's Title VII suit must be affirmed, whether his discrimination claim is precluded by the Appellate Division's judgment, or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. But while it is academic here (as the Government's footnote treatment appears to recognize), we think that the Government is wrong both in principle and in its assumption that the state courts could not consider a Title VII claim as such. As one court has recently said, citing *Mitchell, supra*, with approval:

> Under established precedent, the identity of two actions, as intimately tied together as these two, will not be destroyed in the res judicata context simply because the two suits are based on different statutes. . . . Nor will the rule be any different because a

14, n. 12), petitioner seeks to avoid the preclusive effect of the

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> state statute is the authority for one action and a federal statute for the other, when the two statutes afford the same right or interdict the same wrong. . . .

Nash C'ty Bd. of Educ. v. *Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 50 U.S.L.W. 3250 (October 5, 1981). *See also, e.g., Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927), stating the test to be whether there is "a violation of but one right by a single legal wrong". Here the right which petitioner has sought to vindicate in both the state and federal proceedings is the right to be free from discrimination in his employment relationship and the alleged wrong is a denial of that right. Moreover, the result is the same whether or not the federal courts have exclusive jurisdiction over the federal cause of action, at least where the federal plaintiff is not compelled to assert it in the state proceedings. *Becher* v. *Contoure Laboratories*, 279 U.S. 388 (1929, Holmes, J.) and *Nash C'ty Bd. of Educ.* v. *Biltmore Co.*, *supra*, 640 F.2d at 488-93.

We must also take exception to the Government's assertion that the federal court's jurisdiction over Title VII claims is exclusive simply because the Government so "explained" in a brief filed last term in a case having nothing to do with res judicata (*see* Government Brief n. 20). As this Court recently reiterated:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. See *California* v. *Arizona*, 440 U.S. 59, 66-67 (1979); *Dowd Box Co.* v. *Courtney*, [368 U.S. 502, 507-508 (1961)]. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Gulf Offshore Co. v. *Mobil Oil Corp.*, ___ U.S. ___, 101 S.Ct. 2870, 2875 (1981). There is no inconsistency between achieving the objectives of Title VII and concurrent state court jurisdiction since, as was also pointed out in *Gulf Offshore Co.*:

> Exclusive federal court jurisdiction over a cause of action generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 U.S.C. § 1441(b).

Id. at 101 S.Ct. 2878 n. 12.

So too, both 43 U.S.C. § 1333(b) (now 43 U.S.C. § 1349(b)) which was involved in *Gulf Offshore*, and section 706(f)(3) of Title VII provide that the federal court "shall have jurisdiction". Title VII also parallels § 301(a) of the Labor-Management Relations Act as to which concurrent jurisdiction was sustained in *Dowd Box Co.*, *supra*, since both were enacted because of a congressional concern that many states would not provide a remedy for the perceived wrong. Compare 368 U.S. at 509-512 with the discussion of Title VII's legislative history at *post*, pp. 29 to 37.

state court judgment by calling into question the fairness of the state procedures.

To assess petitioner's attack on the disposition of his claim by New York's administrative and judicial systems, it is necessary first to understand the manner in which those systems function. A claim of employment discrimination, lodged with the NYHRD pursuant to section 297 of the Human Rights Law, N.Y. Exec. Law §297(1) (McKinney 1972), requires the NYHRD to conduct a "prompt investigation" of the complaint to determine "whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaging in an unlawful discriminatory practice." N.Y. Exec. Law §297(2). Before this determination as to probable cause can be made, the complainant is entitled to a "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony".[25] *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D.2d 332, 336, 399 N.Y.S.2d 541, 544 (1977). Before the probable cause determination may be made, the complainant must be afforded the opportunity to rebut any evidence which has been submitted by the respondent (Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y. C.R.R. 465.6 (1977) reprinted at S.A. 64), and may be accorded the opportunity directly to confront a representative of the respondent at a "confrontation conference". Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.6, reprinted at S.A. 64. *See Taber* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 990, 991, 408 N.Y.S.2d 826, 827-28 (1978).[26]

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[25] Although entitled to the assistance of counsel throughout, a *pro se* complainant has the right to cause the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents on his behalf. Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C. R.R. 465.12, reprinted at S.A. 64.

[26] A confrontation conference need not be held provided that the complainant "has otherwise been given a full opportunity to present his case and rebut

If the investigation preceding the determination of probable cause is unduly abbreviated or one-sided, the NYHRD's finding of no probable cause will be overturned on appeal by the Appellate Division as having been arbitrary and capricious. *Gregory* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 775, 776, 407 N.Y.S.2d 256 (1978); *Tenenbaum* v. *State Division of Human Rights*, 50 A.D.2d 257, 259, 376 N.Y.S.2d 542, 544 (1975).

If the investigation discloses probable cause and efforts at conciliation fail, the NYHRD must conduct a public hearing to determine the merits of the complaint. N.Y. Exec. Law §297(4)(a) (McKinney 1972); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970). In determining whether a complainant is entitled to a hearing, the NYHRD must give "full credence . . . to the complainant's version of the events". *State Division of Human Rights* v. *Buffalo Glass Co.*, 42 A.D.2d 678, 344 N.Y.S.2d 374, 375 (1973); *accord*, *State Division of Human Rights* v. *Xerox Corp.*, 49 A.D.2d 21, 23, 370 N.Y.S.2d 962 (1975), *aff'd*, 39 N.Y.2d 873, 352 N.E.2d 139, 386 N.Y.S.2d 221 (1976). It is only where the documentary and testimonial evidence adduced by the complainant in support of his complaint and in rebuttal of the respondent's response fails, as a matter of law, to reveal any

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evidence submitted by respondent". *Taber* v. *New York State Human Rights Appeal Bd.*, *supra*, 64 A.D.2d at 991, 408 N.Y.S.2d at 828.

Although a confrontation conference is not invariably required, when one is held, it must provide "a full and complete opportunity to confront and rebut the respondent employer's answer". *Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d 746, 747 (1981). If the confrontation conference has been unduly foreshortened, a finding of no probable cause will be reversed by the Appellate Division. *Id.* For other decisions overturning findings of no probable cause as capricious due to the one-sidedness of the underlying investigation or the failure to hold a confrontation conference or to examine witnesses crucial to a complainant's case, *see Alttery* v. *State Div. of Human Rights*, 61 A.D.2d 780, 402 N.Y.S.2d 405 (1978); *Papeskov* v. *State Div. of Human Rights*, 60 A.D.2d 545, 400 N.Y.S.2d 65 (1977); *Long Island R.R.* v. *New York State Human Rights Appeal Bd.*, 39 A.D.2d 924, 399 N.Y.S.2d 259 (1977); *Clarke* v. *T.V.C. Lab, Inc.* 54 A.D.2d 675, 387 N.Y.S.2d 849 (1976); *State Div. of Human Rights* v. *Mecca Kendall Corp.*, 53 A.D.2d 201, 385 N.Y.S.2d 665 (1976); *State Div. of Human Rights* v. *Board of Educ., Olean Pub. Schools*, 46 A.D.2d 483, 363 N.Y.S.2d 370 (1975).

merit to the complaint that the NYHRD may, without holding a public hearing, make a finding of no probable cause. *Flah's Inc.* v. *Schneider*, 71 A.D.2d 993, 420 N.Y.S.2d 283, 284 (1979); *State Division of Human Rights* v. *Genesee Brewing Co.*, 67 A.D.2d 1078, 415 N.Y.S.2d 134, 135 (1979); *Stasiak* v. *Montgomery Ward & Co.*, 66 A.D.2d 962, 411 N.Y.S.2d 700, 701 (1978); *Glen Cove Public Schools* v. *New York State Human Rights Appeal Board*, 58 A.D.2d 591, 592, 395 N.Y.S.2d 493, 494 (1977); *Rodriguez-Abad* v. *Hurst*, 49 A.D.2d 115, 373 N.Y.S.2d 583 (1975); *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra*, 33 A.D.2d at 313, 307 N.Y.S.2d at 695 (1970);[27] *Cf. State Division of Human Rights* v. *Bond, Schoeneck & King*, 52 A.D.2d 1045, 1046, 384 N.Y.S.2d 568, 569 (1976); *Pember* v. *New York State Division of Human Rights*, 50 A.D.2d 903, 377 N.Y.S.2d 554 (1975).

A complainant may appeal the dismissal of his complaint by the NYHRD to the Appeal Board, an adjudicatory administrative

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[27] *Mitchell, supra*, 553 F.2d at 770-71, relied upon *Mayo* v. *Hopeman Lumber & Mfg. Co., supra*, for the proposition that the dismissal of a complaint without a hearing is justified only where it appears "virtually that as a matter of law the complaint lacks merit". The Government's brief argues, at 15-16 n. 15, that a subsequent Appellate Division opinion (*State Div. of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Comm., supra*) "retreated" from *Mayo's* "broad sweep" and made it "clear that factual disputes may be resolved adversely to the complainant without holding a hearing". This is simply untrue.

First, *Speller* itself stated: "*We do not retreat from our holding in* Mayo". 59 A.D.2d at 337, 399 N.Y.S.2d at 544 (emphasis added).

Second, it is clear that, in stating that questions of fact could be resolved by the NYHRD, the *Speller* court was referring, in dictum, to the "ultimate determination of the merits of the complaint" *after* a public hearing had been held. *Id.* Where, as here, there has been no hearing, the finding of probable cause—to be rational and sustainable—must be based on the complaint's lack of legal merit. Cases subsequent to *Speller* have so held. *E.g., Flah's Inc.* v. *Schneider, supra*, 71 A.D.2d at 993, 420 N.Y.S.2d at 284 ("The record does not indicate that there was a thorough inquiry during which the complainant was afforded a full opportunity to present her contentions. In addition, it does not appear that the complaint lacks merit as a matter of law. Therefore, the complaint should not have been dismissed. . . ." [citing both *Speller* and *Mayo*]); *State Div. of Human Rights* v. *Genesee Brewing Co., supra*, 67 A.D.2d at 1078, 415 N.Y.S.2d at 135; *Stasiak* v. *Montgomery Ward & Co., supra*, 66 A.D.2d at 962, 411 N.Y.S.2d at 701.

footnote continued on following page

body separately constituted from and independent of the NYHRD. *See, Mitchell, supra,* 553 F.2d at 267 n. 4. If there has been a hearing, the Appeal Board's review of the dismissal ascertains whether it is "supported by substantial evidence on the whole record". N.Y. Exec. Law §297-a(7)(d) (McKinney 1972). Where, as here, there has been no hearing, the finding of no probable cause will be upheld if "not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion". *Id.*, §297-a(7)(e). In addition, the Appeal Board is empowered to review the NYHRD's dismissal to ensure that it is "in conformity with the constitution and the laws of the state and the United States". *Id.*, §297-a(7)(a).

Appeals may—but need not—be taken from the Appeal Board to the Appellate Division pursuant to section 298 of the Human Rights Law. This procedure, created specially for enforcement

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When the NYHRD's finding of no probable cause is reviewed, it is measured either by a "substantial evidence on the whole record" standard (N.Y. EXEC. LAW §297-a(7)(d)) or by a "not arbitrary, capricious" standard. *Id;* §297-a(7)(e). The "substantial evidence" standard, which mandates deference to the NYHRD's resolution of factual issues, is employed where there has been a public hearing. The "arbitrary and capricious" standard is employed where there has been no hearing and permits dismissal only where there has been no evidence to support the complaint. *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra,* 33 A.D.2d at 313, 307 N.Y.S.2d at 695; *cf., State Div. of Human Rights* v. *Univ. of Rochester School of Medicine & Dentistry,* 72 A.D.2d 941, 942, 422 N.Y.S.2d 224, 225-26 (1979); *see also, Division of Human Rights* v. *Regional Transit Serv.,* 79 A.D.2d 1106, 435 N.Y.S.2d 856, 857 (1981). The dictum in *Speller* concerning the NYHRD's authority to resolve factual disputes pertained to the situation in which there has been a hearing and in which dismissal will be upheld if supported by substantial evidence. In the instant case, petitioner had no hearing, and the requirement of *Mayo* that the complaint lack merit "virtually as a matter of law" applied.

Since it is not limited to the record, the scope of judicial review under the "arbitrary and capricious" test is broader than under the "substantial evidence" test and permits the Appellate Division, where the record appears incomplete, itself to designate a referee or trial term judge to conduct a de novo hearing. *See* D. Gabrielli (Associate Judge of the New York Court of Appeals) and J. Nonna, *Judicial Review of Administrative Action in New York: An Overview and Survey,* 52 ST. JOHN'S L.REV. 361, 371 n. 44 (1978); *Mandle* v. *Brown,* 5 N.Y.2d 51, 152 N.E.2d 511, 177 N.Y.S.2d 482 (1958); *In re Caristo Constr. Corp.,* 30 Misc.2d 185, 221 N.Y.S.2d 956 (Sup. Ct. 1961), *modified sub nom. Caristo Constr. Corp.* v. *Rubin,* 15 A.D.2d 566, 222 N.Y.S.2d 998 (1961), *aff'd,* 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962).

of the Human Rights Law, mandates that appeals be determined "as expeditiously as possible and with lawful precedence over other matters" N.Y. Exec. Law §298.[28] There is no requirement in section 298 that complainants also invoke the provisions of Article 78, N.Y. Civ. Prac. Law, as did petitioner.[29] *Cf.*, 8 J. Weinstein, H. Korn and A. Miller, *New York Civil Practice Law* ¶ 7801.02, pp. 78-5–78-6 (1980).

In reviewing the determination of the Appeal Board, the Appellate Division has jurisdiction of the proceeding and of all the questions determined therein,[30] and has the power to

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[28] The provision for expedited appeals, like the availability of interlocutory judicial appeals from non-final orders of the NYHRD and Appeal Board, exists by virtue of the Human Rights Law's "unmistakably remedial intent to combat the pernicious effects of discrimination". *State Office of Drug Abuse Serv.* v. *State Human Rights Appeal Bd.*, 48 N.Y.2d 276, 282-83, 422 N.Y.S.2d 647, 650 (1979). *See also, Gramatan Ave. Assoc.* v. *State Div. of Human Rights*, 45 N.Y.2d 176, 378 N.E.2d 183, 408 N.Y.S.2d 54, 56-57 (1978) (declaring that state policy of eradicating discrimination requires that Human Rights Law "be construed liberally for the accomplishment of the purposes thereof").

[29] Article 78 provides for special proceedings, in the nature of the common law writs of mandamus, certiorari, and prohibition, to test the actions of state agencies or officials. Article 78 provides, *inter alia*, for review according to an "arbitrary and capricious" standard. N.Y. CIV. PRAC. LAW §7803(3). If there has been a hearing, the standard of review is a "substantial evidence" test. *Id.* §7803(4). In addition, an agency's adjudicatory procedure can be challenged—under Article 78—for having been applied in violation of federal constitutional standards of due process. D. Gabrielli and J. Nonna, *Judicial Review of Adminstrative Action in New York: An Overview and Survey*, 52 ST. JOHN'S L. REV. 361, 375-76 (1978); *Hammer* v. *Town of Greenburgh*, 440 F.Supp. 27, 29 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *303 West 42nd St. Corp.* v. *Klein*, 46 N.Y.2d 686, 693, 389 N.E.2d 815, 416 N.Y.S.2d 219, 223 (1979); *Overhill Building Co.* v. *Delany*, 28 N.Y.2d 449, 456, 458, 322 N.Y.S.2d 696, 701, 703 (1971); *Tischler* v. *Board of Educ.*, 37 A.D.2d 261, 323 N.Y.S.2d 508 (1971); *Anderson* v. *Board of Educ.*, 77 Misc.2d 904, 354 N.Y.S.2d 521, 526-27 (Sup. Ct. 1974), *rev'd on other grounds*, 46 A.D. 360, 362 N.Y.S.2d 536 (1974), *aff'd* 38 N.Y.2d 897, 346 N.E.2d 551, 382 N.Y.S.2d 750 (1976); *Comparato* v. *Knauf*, 61 Misc. 2d 245 248, 305 N.Y.S.2d 640, 644 (Sup. Ct. 1969); *cf., Board of Regents* v. *Tomanio*, 446 U.S. 478, 491-92 n. 9 (1980).

[30] Necessarily, the Appellate Division has jurisdiction to review the Appeal Board's determination, pursuant to N.Y. EXEC. LAW §297-a(7)(a), that the NYHRD's order has been reached "in conformity with the constitution and the laws of the state and the United States." Accordingly, a claim that the NYHRD failed to accord procedural due process to a complainant would be cognizable by the Appellate Division.

enforce, modify or set aside in whole or in part any order of the NYHRD or Appeal Board. N.Y. Exec. Law §298.[31]

The Appellate Division's judgment is final, subject to review by the New York Court of Appeals. N.Y. Exec Law §298. *Cf.*, N.Y. Civ. Prac. Law, §411.

Petitioner's claim, in this Court, that he was not accorded a "full and fair" opportunity to be heard at the NYHRD level is a reiteration of the claim—advanced by him before the Appeal Board and the Appellate Division—that the NYHRD's procedures were unfair. The procedural infirmities supposedly inhering in the NYHRD's investigation and determination are that petitioner was unassisted by counsel; that he was denied the right to call any of the witnesses he "repeatedly identified"; that there were no Chemico witnesses for him to confront; that he was not afforded any discovery; and that there was no formal, adversarial hearing at which a record was made. Pet. Brief, p. 4.

By focusing on the claimed procedural shortcomings in his particular case, petitioner loses sight of the fact that the critical inquiry pertains to the adequacy of the procedural rights which were *available*, whether or not they were exercised. Holding that principles of federalism and comity barred a challenge under 42 U.S.C. §1983 to the constitutionality of certain state court contempt proceedings, this Court explained, in *Judice* v. *Vail*, 430 U.S. 327, 337 (1977), that:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention. There is no support . . . for the District Court's belief that the state courts must have an *actual* hearing . . . in order for *Younger* and *Huffman* to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the

[31] On occasion, the Appellate Division—in reviewing a finding of no probable cause—has gone further and, rather than merely remitting the matter to the NYHRD, has granted the complainant the relief sought: back pay with interest. *E.g.*, *Phoebe* v. *State Div. of Human Rights*, 70 A.D.2d 862, 418 N.Y.S.2d 55 (1979).

> ongoing state proceedings, [citation omitted] and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.

(Emphasis in original; footnotes omitted); *see*, *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 163-69 (1932).

Thus, while petitioner complains of his lack of legal representation before the NYHRD, the fact remains that he was entitled—but declined—to appear with counsel. Although petitioner was likewise free to proceed *pro se*, it is anomalous for him now to argue that his decision to dispense with counsel constitutes a procedural infirmity in the structure of New York's Human Rights Law. Such an argument, seeking to gain an advantage from his failure to appear with counsel, is particularly inappropriate given that it is one of the purposes of Title VII —by permitting the award of attorney's fees to the prevailing party (42 U.S.C. § 2000e-5(k))—to encourage legal representation, even at the state administrative level. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978).

Similarly, the NYHRD's alleged failure to hear the witnesses petitioner "repeatedly identified" (Pet. Brief at 4) represents a default by petitioner rather than a structural defect in the NYHRD's procedures. Mr. Kremer neglects to mention that he first "identified" his potential witnesses when he sought review, by the Appeal Board, of the NYHRD's dismissal of his claim. (*See* S.A. 11, 12) Having failed to provide any list of witnesses to the NYHRD, petitioner should not be heard to complain that the NYHRD failed to call witnesses only *subsequently* identified by petitioner. Moreover, because he was appearing *pro se*, petitioner had the right to request the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents on his behalf. *See* Rules of Practice and Procedure of the Division of Human Rights, 9 NYCRR 465.10 (1975); *Mitchell*, *supra*, 553 F.2d at 271 n. 7. That petitioner failed to take advantage of this opportunity hardly warrants the conclusion that the NYHRD's procedures were so flawed as to

be unworthy of deference by a federal court. *Cf. Juidice* v. *Vail, supra,* 430 U.S. at 337.

Petitioner complains that the NYHRD's investigation was devoid of the formalities which characterize a plenary Title VII suit in a federal court. Implicitly, petitioner is arguing that, for the judgment of a state court affirming the determination of a state agency to be entitled to full faith and credit pursuant to 28 U.S.C. §1738, the underlying procedures of the agency must not only be "full and fair", they must actually replicate those found in a United States District Court.

Notably, however, the definition of what constitutes a full and fair procedure depends entirely upon the type of adjudication which is involved. There is no simple, rigidly fixed, model of procedural fairness universally applicable to all proceedings. In discussing the flexible nature of procedural fairness, this Court has made it abundantly clear that the process which is "due" varies with the nature of the process. Thus, in *Mitchell* v. *W. T. Grant* Co., 416 U.S. 600, 610 (1974), this Court stated:

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB* v. *Mackay Co.*, 304 U.S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1972).

In the case of New York's anti-discrimination statute, the New York legislature has made a judgment that the fundamental fairness of the NYHRD's procedures can best be ensured by permitting those aggrieved by its determinations to argue—on appeal to the Appeal Board and the Appellate Division—that a determination has been arrived at in violation of the New York or United States constitutions. N.Y. Exec. Law §§297-a(7)(a) & 298.

A refusal to accord full faith and credit to the Appellate Division's judgment, on the grounds that procedures followed in a federal court were not utilized, would negate the expressed will of the New York legislature, would trivialize the role of the Appellate Division in ensuring the fundamental fairness of the administrative proceedings which it is charged with reviewing, and would impugn the ability and willingness of New York's courts to afford litigants basic procedural due process. This Court, however, has emphatically refused to assume any such incompetence or recalcitrance on the part of the state judiciaries. *Trainor* v. *Hernandez*, *supra*, 431 U.S. at 443; *Stone* v. *Powell*, *supra*, 428 U.S. at 493-94 n. 35 (1976); *Schlesinger* v. *Councilman*, 420 U.S. 738, 755-56 (1975);[32] *cf.*, *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-08 (1962).

With respect to petitioner's claims that he was improperly denied the right to confront representatives of Chemico or to have a decision rendered on the basis of a formal record made at a full-fledged adversarial hearing, it is noteworthy that other complainants—situated similarly to petitioner—have often been able successfully to persuade the Appellate Division that administrative determinations of no probable cause were procedurally unfair for each of those reasons.[33]

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[32] As the Court stated in *Huffman* v. *Pursue, Ltd.*, *supra*, 420 U.S. at 611 (1975): "Yet, Art. VI of the United States Constitution declares that 'the Judges in every state shall be bound' by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." Petitioner in this case is, likewise, asking this Court to fashion an exception to 28 U.S.C. §1738 on the assumption that appeals—like Mr. Kremer's own appeal—raising claims as to the lack of fundamental fairness of the state administrative procedure will be automatically and summarily rejected by New York's appellate courts.

[33] *E.g.*, *Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d at 747 (1981); *Perez* v. *New York State Human Rights Appeal Board*, 70 A.D.2d 558, 416 N.Y.S.2d 813 (1979); *Belgrave* v. *New York State Division of Human Rights*, 68 A.D.2d 922, 414 N.Y.S.2d 377 (1979); *Gregory* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 775, 407 N.Y.S.2d 256 (1978); *State Division of Human Rights* v. *Mecca Kendall Corp.*, 53 A.D.2d 201, 385 N.Y.S.2d 665 (1976); *Burns* v. *Sabena Belgian World Airlines*, 42 A.D.2d 347, 347 N.Y.S.2d 958 (1973); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, *supra*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970). *See also* authorities cited, *ante*, at n. 26.

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Where, on the other hand, the record before the NYHRD discloses no factual issue relating to the claim of employment discrimination and it appears as a matter of law that the complaint lacks merit, the NYHRD's finding of no probable cause will be left undisturbed on appeal, notwithstanding the absence of a hearing or of an opportunity for the complainant to confront representatives of his employer. *State Division of Human Rights* v. *Bond, Schoeneck & King*, 52 A.D.2d at 1045, 384 N.Y.S.2d 568 (1976); *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra*, 33 A.D.2d at 313, 307 N.Y.S.2d at 694; *cf., Mitchell, supra*, 553 F.2d at 272 n. 9.

Given the willingness of the New York courts to reverse and remand procedurally inadequate determinations of no probable cause, *see* n. 26, *ante*, it simply must be assumed that petitioner failed to persuade the Apellate Division that there was any legal basis to his claim. To indulge the contrary assumption—advocated by petitioner—that the Appellate Division automatically rubber-stamped the agency whose actions it was reviewing, is both to disregard the numerous cases reversing procedurally inadequate determinations by the NYHRD and to presume, contrary to a fundamental postulate of "Our Federalism", *Younger* v. *Harris*, 401 U.S. 37, 44-5 (1971), that state courts either cannot or will not enforce fundamental federal rights.[34]

Petitioner also complains of the allegedly hurried, truncated nature of his interview with the field representative. Notably, however, he claims to have had sufficient time at that interview to refute all of Chemico's defenses (S.A. 68). A claim that the pre-hearing investigation is too abbreviated is one which can be raised on appeal to the Appellate Division. *See, e.g., Wolchok* v. *New York State Human Rights Appeal Board, supra*, 441 N.Y.S.2d at 746. As to petitioner's remaining claim of procedural unfairness—the unavailability of discovery—suffice it to say that due process imposes no such requirement. *Wardius* v. *Oregon*, 412 U.S. 470, 475 (1973); *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969).

At page 17, n. 14 of his Brief, petitioner quotes a brief passage from a recent Bar Association Report on the NYHRD and the Appeal Board, which, taken out of context, implies criticism of their procedures. A reading of this Report in its entirety reveals it to be a balanced, and not particularly critical, assessment of both agencies.

[34] The right to a procedurally fair administrative investigation is cognizable under the Fourteenth Amendment's due process clause. Due process violations can be raised under N.Y. EXEC. LAW §§297-a(7)(a) and 298 and can be, and

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Important values of repose and finality are undermined by collateral attacks upon the correctness of state court judgments. Once it is clear that a state judicial system reviewing administrative determinations offers the opportunity to challenge the procedural adequacy of those determinations, collateral attack in federal court upon that system's judgments endangers those values of repose and finality and compromises the independence of the state judiciary without offering any substantial prospect of enhanced ascertainment of the "Facts as They Really Are". Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 Yale L.J. 164, 188-89 (1977).

II. Title VII, in Providing a Federal Forum to Supplement State Anti-Discrimination Efforts, Does Not Override Well-Established Principles of Repose and Comity, Which Require That Federal Courts Accord Preclusive Effect to Final State Court Judgments.

In addition to claiming that the state proceedings were unfair to him, Mr. Kremer argues that "[p]reclusion would undermine a Congressional plan to enforce a national policy 'of the highest order' " (Pet. Brief, p. 23) and would be incompatible with the "comprehensive enforcement scheme" of Title VII (Pet. Brief, p. 9, quoting *New York Gaslight Club* v. *Carey*, *supra*, 447 U.S. at 63.) Implicit, therefore, in his argument is a claim that by enacting Title VII Congress impliedly repealed section 1738.[35]

That, by creating a private federal cause of action under Title VII, Congress evidenced a national policy "of the highest order" is no basis for concluding that it intended to nullify the existing

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often are, raised in Article 78 proceedings. *See* n. 29, *ante*. Indeed, all of the inadequacies which petitioner now cites were raised—on his appeal to the Appellate Division—and are tantamount to a claim that his procedural due process rights were violated. Analytically, whether proceeding under an "arbitrary and capricious" or "abuse of discretion" standard, or under the terms of the Fourteenth Amendment, the Appellate Division's review of administrative actions is identical. To charge that court with mindlessly ratifying agency determinations is indistinguishable from labelling it unfit to safeguard federal due process rights.

[35] Petitioner made this claim *explicitly* in the brief he submitted to the Court of Appeals and in his Petition for Certiorari, at p.10 n.**.

federal statute which requires that state court judgments be accorded full faith and credit. The principle of finality enforced through section 1738 is itself "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the court." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917), quoted in *Federated Department Stores, Inc.* v. *Moitie, supra*, 101 S.Ct. at 2429.

The validity of a claim of implied repeal, moreover, does not call for judicial weighing of the relative strengths of the legislative policies behind the two provisions in question. It focuses instead upon the actual intent of Congress in passing the more recent provision. And because of the "cardinal rule" of statutory construction, *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936), that repeals by implication are disfavored,[36] "[t]he intention of the legislature to repeal must 'be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939), quoting *Red Rock* v. *Henry*, 106 U.S. 596, 601, 602 (1882); *Watt* v. *Alaska*, ___ U.S. ___, 101 S.Ct. 1673, 1678 (1981). In urging this Court to find an implied repeal, petitioner, therefore, "bears a heavy burden of persuasion . . .," *Amell* v. *United States*, 384 U.S. 158, 165 (1966), because "[o]nly a clear repugnancy between the old . . . and the new [law] results in the former giving way . . . ." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 457 (1945). *See: Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-90 (1978); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-20. (1975).

Because "[t]he normal rule [is] that Congress expects its statutes to be read together",[37] "when two statutes are capable

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[36] *See, e.g., United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974); *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n.*, 393 U.S. 186, 193 (1968); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 565 (1963); *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Wood* v. *United States*, 16 Pet. 342, 362-63 (1842).

[37] Currie, *Res Judicata: The Neglected Defense*, 45 U.CHI.L.REV. 317, 329 (1978).

of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974).[38] Accordingly, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155, (1976) *quoting Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357.

The Court has recognized

> "two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ." *Posadas* v. *National City Bank*, 296 U.S. 497, 503.

Radzanower v. *Touche Ross & Co.*, *supra*, 426 U.S. at 154.

This case does not fall within either of those categories. Obviously, Title VII is not a "substitute" for section 1738. To discover whether there is an "irreconcilable conflict" between the two provisions requires an examination of the actual terms of Title VII and of Congress' purpose in enacting it.

No provision of Title VII is inconsistent on its face with section 1738, because Title VII does not expressly grant a claimant or respondent a de novo hearing in a federal court. Rather, all that Title VII does is to give a claimant a right to bring an action in a federal district court, grant state administrative agencies exclusive jurisdiction over such claims for a period of 60 days, and specify the weight—"substantial"—to be given

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[38] *See: Watt* v. *Alaska*, *supra*, 101 S.Ct. at 1678; *Radzanower* v. *Touche Ross & Co.*, *supra*, 426 U.S. at 155; *cf.*, *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357; *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 685.

by the EEOC to those state administrative proceedings. 42 U.S.C. §2000e-5(b) and (c). Title VII does not address the question of the weight which a federal court should accord any prior determinations—state or federal, administrative or judicial—and, importantly, neither the deferral nor any other provisions of Title VII refer to state judicial proceedings.

As to whether the legislative history of Title VII reveals any policy behind the statute which is "irreconcilable" with section 1738 and principles of preclusion, it is useful to consult this Court's prior decisions that have considered the legislative intent behind a parallel civil rights statute, 42 U.S.C. §1983,[39] with respect to available state remedies. In *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), the Court noted that in enacting section 1983 Congress "clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights" because of its concern that the states could not or might not protect those rights and "that these failings extended to the state courts." Earlier in *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961), the Court concluded that, because of congressional fear of "prejudice, passion, neglect [or] intolerance" in state forums, it was "abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ."

The Court found, therefore, because of the unmistakably high priority which Congress attached to providing a federal forum under section 1983, that "[t]he federal remedy is *supplementary to the state remedy*, and the latter need not be first sought and refused before the federal one is invoked." *Id.* (emphasis added).

However, despite Congress's concern over the availability of adequate state forums for the vindication of federal constitutional rights, and its decision to provide a federal forum for claims under section 1983, it did not intend to exempt such claims from traditional rules of preclusion. *Allen* v. *McCurry*,

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[39] Section 1983 was originally section 1 of the Civil Rights Act of 1871, 17 Stat. 13, and was derived from section 2 of the Civil Rights Act of 1866, 14 Stat. 27. *See, Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545 n. 9 (1972).

supra, 449 U.S. at 98. The Court there found "only the most equivocal support" in the legislative history of section 1983 for the argument that "in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override section 1738 or the common-law rules of collateral estoppel and res judicata."[40] 449 U.S. at 99.

Since Title VII is instinct with respect for state efforts to combat employment discrimination, it is difficult to believe that in enacting it Congress intended to retreat from the principles of comity and federalism embodied in section 1738, especially in those states which, like New York, had established and effectively administered remedies comparable to those of Title VII.[41] Under both section 1983 and Title VII, Congress provided "supplementary" remedies in order to open the doors of the federal courthouse, not to let unsuccessful State court litigants take a second bite at the apple.

Because Title VII cannot be distinguished from section 1983 on the basis of any underlying legislative intent to retreat from principles of preclusion, Mr. Kremer argues that what distinguishes the two provisions and makes Title VII irreconcilable with section 1738 is Title VII's "altogether 'unique' " enforcement scheme (Pet. Brief, pp. 14-15). The feature of Title VII's enforcement scheme thought by petitioner to be incompatible with giving effect to state judicial proceedings is "the 'policy of cooperation', *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 64, between the Federal and state systems which is a keystone of Title VII's grand design." (Pet. Brief, p. 21). It is, therefore, appropriate to examine the legislative history of Title VII's enforcement provisions.

During 1963 and 1964 Congress considered a number of

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[40] The Court also rejected the "generally framed principle" that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arose". 449 U.S. at 103. Nor did it matter, for purposes of preclusion, that the underlying federal claim had been litigated "involuntarily" in the state court, in the context of a criminal trial. *Id.* at 104.

[41] Compare N.Y. EXEC. LAW, §297 with 28 U.S.C. §2000e -5; *cf.*, *Mitchell*, *supra*, 553 F.2d at 269-70.

different enforcement mechanisms in connection with Title VII of the proposed Act. The scheme eventually enacted—limited deferral to state administrative agencies, creation of a federal agency, the EEOC, without adjudicatory or enforcement powers, and establishment of a private cause of action—reflected a series of compromises between advocates and opponents of strong federal enforcement. Read in its entirety, the legislative history of Title VII's enforcement provisions hardly supports petitioner's conclusion, pieced together through selective quotation from this Court's opinions, that "a plaintiff has a 'statutory right to attempt to establish his claim in a Federal court,' *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 56, 'if satisfactory relief is not obtained in state *forums*,' *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 67 (emphasis supplied)". (Pet. Brief, p. 10)

Rather, that legislative history repeatedly demonstrates Congress' intention to fashion a federal remedy to "supplement rather than supplant" existing state anti-discrimination remedies, *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 48, and in this respect is similar to section 1983. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 183. The very New York procedures at issue here were repeatedly held up by the proponents of the bill as an example of existing state legislation effectively combatting the same evils sought to be reached under Title VII.[42] Where existing state remedies were in place and working, Congress evidenced the greatest possible deference and respect.

In his remarks to the Senate concerning the bill's deferral provisions, for example, Senator Humphrey, one of the advocates of strong enforcement, praised the measure as "a 'States rights bill,' and, I may say, a 'States responsibilities bill.' " 110 Cong. Rec. 12725 (1964), *1964 Legis. History*, at 3008. He made clear the supplementary nature of the proposed federal remedy:

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[42] *See, e.g.*, 110 Cong. Rec. 1643 (1964), *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1968) at 3258-3259 (hereinafter cited as 1964 Legis. History) (remarks of Congressman Ryan); 118 Cong. Rec. 1635-1636 (1964), 1964 Legis. History at 3345-3346 (remarks of Congressman Reid); 110 Cong. Rec. 12595 (1964), 1964 Legis. History at 3066 (remarks of Senator Clark).

"In instances where States are unable or unwilling to provide this protection the Federal Government must have the authority to act." *Id.*[48]

Limited deferral to state administrative agencies was one means chosen by Congress to carry out its determination to make Title VII a truly supplemental remedy. Title VII also requires the EEOC to "accord substantial weight to findings and orders made in such proceedings." (42 U.S.C. §2000e-5(b)). Not only, however, does Title VII neither require nor encourage a claimant to pursue state judicial remedies, the statute itself makes no reference to state courts, and the voluminous legislative history of the 1964 Act contains no discussion of state judicial proceedings, or the role, if any, of state courts in adjudicating claims cognizable under Title VII.

On the other hand, there were protracted discussions in Congress over the division of adjudicatory responsibility between the EEOC and the federal courts, with Congress ultimately determining to allot adjudication on the *federal* plane exclusively to the latter. That is what Congress meant, and all that it meant, by its grant of a de novo hearing.

Nothing in the legislative history of Title VII's enforcement provision supports petitioner's view that Congress intended to guarantee a claimant a de novo federal trial once a state court has rejected his claim on the merits. The congressional proponents of the 1964 Act, indeed, were *opposed* to the enforcement provisions that were eventually adopted and favored instead an enforcement scheme that would have afforded neither claimants nor respondents federal court trial on the merits. Title VII's de novo provision was added to the bill, over its sponsor's objections, in order to protect *respondents* from over-zealous enforcement by the EEOC.

Thus, the version of the 1964 bill approved by the subcommittee of the House Judiciary Committee provided for investiga-

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[48] *See* the other statements of Senator Humphrey of like effect *quoted in* 2 SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1334 (1970) and the remarks of Senators Case and Clark, both floor managers of the Bill, at, respectively, 110 CONG. REC. 7243 (1964), 1964 LEGIS. HISTORY at 3286, and 110 CONG. REC. 7205 (1964), 1964 LEGIS. HISTORY at 3344-45.

tion, prosecution, adjudication and enforcement (through cease and desist orders) by the EEOC, with Circuit Court review of its determinations under the Administrative Procedure Act.[44] This scheme was anathema to those concerned over the rights of employers and other respondents at the hands of a new federal agency, whose institutional bias was perceived as likely to be hostile to their interests. The provision which petitioner characterizes as being intended to afford claimants de novo trials was originally offered unsuccessfully by Representative Griffin as an amendment to H.R. 405 in the House Education and Labor Committee, but was later incorporated in the bill in the House Judiciary Committee at the same time that the language giving the EEOC power to issue cease and desist orders was dropped.[45] Congressman McCulloch, a member of the Judiciary Committee and the key architect of the compromise, described this change as providing a "safeguard" whereby "the employer is entitled to a hearing in a Federal court and an order by a duly appointed judge of the Federal Court."[46]

In 1971 and 1972 the entire enforcement mechanism of Title VII was subjected to wholesale re-examination during the course of consideration of the Equal Employment Opportunity Act of

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[44] The subcommittee version of HR 7152 is not printed in the legislative materials but was said to have been "identical", in pertinent part, to H.R. 405 which had been reported by the House Education and Labor Committee. *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., 2660 (October 15, 1963) (remarks of Attorney General Kennedy). H.R. 405 appears in *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., 2320-2336 (July 31, 1963).

[45] *See, Hearings on H.R. 7152 Before the Comm. on Rules*, 88th Cong., 2d Sess. 255 (1964) (remarks of Congressman McCulloch).

[46] *Hearings on H.R. 7152 Before the Comm. on Rules*, 88th Cong., 2d Sess. 252, 255 (1964).

Congressman McCulloch and seven other representatives submitted a memorandum spelling out the basis of the compromise. ("[W]e believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings. . . .") H.R. REP. No. 914, Pt. 2, 88th Cong. (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2515-2516. For a similar explanation, see the Interpretative Memorandum submitted by Senators Clark and Case, the floor-managers of the Bill, 110 CONG. REC. at 7213-14 (1964), 1964 LEGIS. HISTORY at 3044.

1972.[47] During the course of the debates, Congress again considered proposals to give the EEOC adjudicatory and enforcement powers, subject to review in the Courts of Appeal under the Administrative Procedure Act.

Those who opposed giving the EEOC such powers argued against placing investigatory, adjudicatory and enforcement powers in a single agency.[48] Senator Allen, for instance, referred to the EEOC as a "hanging jury" and characterized the proposal as "a dangerous grab for power . . . deliberately designed to subvert the prime tenet of Anglo-Saxon jurisprudence that an individual is presumed to be innocent until proven guilty." 117 Cong.Rec. 42026 (1971), *reprinted in* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, *Legislative History of the Equal Employment Opportunity Act of 1972* at 571 (1971) (hereinafter cited as *1972 Legis.History*). Elsewhere he characterized the EEOC as "a rabid advocate of its own preconceived ideas of fair employment opportunity." 118 Cong. Rec. 932 (1972), *1972 Legis.History* at 807.[49]

Senators Javits and Williams, both advocates of stronger enforcement, attempted to break the deadlock that arose over this question by introducing an amendment which, instead of granting the EEOC cease and desist powers, would have required the District Court to accept its certified findings. 118 Cong.Rec. 3050, 3373-74 (1972). However, the opponents held fast, insisting that the "amendment really makes a rubber stamp or a 'cat's paw' out of the Federal District Court, rather than to allow it to try these charges de novo and not merely from the record". 118 Cong.Rec. 3379 (1972), 1972 *Legis. History* at 1419 (Remarks of Senator Allen).

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[47] Pub.L. 92-261, March 28, 1972, 86 Stat. 104.

[48] *See, e.g.*, 117 CONG.REC. 32106 (1971), 1972 LEGIS. HISTORY at 301 (remarks of Congressman Broomfield).

[49] *See*, the similar views of Senator Ervin at 118 CONG.REC. 311, 933 (1972), 1972 LEGIS. HISTORY at 632, 809; Senator Tower at 118 CONG.REC. 595 (1972), 1972 LEGIS. HISTORY at 680; and Senator Fannin at 118 CONG.REC. 699-703 (1972), 1972 LEGIS. HISTORY at 704.

The Bill eventually passed only in a compromise form, whereby the EEOC for the first time was given the power to bring suit but hearing and enforcement powers were retained in the federal District Court rather than the EEOC so that employers and other respondents would receive "an impartial judicial decision free from accusation of institutional bias". S.Rep.No. 92-415, 92d Cong. 1st Sess. 86 (1971) (Views of Senator Dominick[50]), *1972 Legis. History* at 494.

Most importantly, during the 1971 and 1972 debates, in the light of seven years' experience since enactment of the 1964 Bill, Congress recognized and sought means to deal with the problems of duplicative litigation against a single respondent. Senator Hruska, for example, expressed his view that "one's sense of fairness is challenged" by "all the proceedings, the collateral proceedings and the independent proceedings in half a dozen forums that could be conducted simultaneously on the same alleged offense." 118 Cong.Rec. 3369 (1972), *1972 Legis. History* at 1398. Those who supported vigorous enforcement also recognized the existence of the problem.[51] Senator Hruska introduced an amendment designed to cure the problem by making Title VII an exclusive federal remedy.[52]

Senator Javits, ranking Republican on the Labor Committee, where the 1972 Bill originated, and Manager for the Senate in the Conference Committee, replied to Senator Hruska by expressing his view that such an amendment was unnecessary to deal with repetitive litigation against a single defendant:

> Furthermore, there is the real capability in this situation of dealing with the question on the basis of res judicata. In other words once there is a litigation—a litigation started by the Commission, a litigation

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[50] Senator Dominick was the sponsor of the compromise amendment.

[51] *See, e.g.*, the views of Senator Williams at 118 Cong.Rec. 585 (1972), 1972 Legis. History at 658 (referring to the "degree of inequity and unfairness where people across the country can be subject to investigation and lawsuit from many quarters"), and at 118 Cong.Rec. 297 (1972), 1972 Legis. History at 588.

[52] *See*, Amendment Number 877, 118 Cong.Rec. 3172-73 (1972), 1972 Legis. History at 1382.

> started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted.

Id., at 3370, *1972 Legis. History* at 1400-1401.

There is, therefore, no indication in the legislative history of either the 1964 or 1972 Act of any policy behind Title VII creating an "irreconcilable conflict" with section 1738 and principles of res judicata and collateral estoppel. On the contrary, Title VII's "complex" enforcement scheme is in reality entirely in harmony with those traditional principles, which, in turn, enhance Title VII's policy of giving maximum scope to state and local efforts to end discrimination in employment.

There is no reason to believe that the 1964 and 1972 Congresses, on the one hand, endorsed the continued vitality of parallel state antidiscrimination laws, and, on the other, intended to permit federal courts to deny finality to state court judgments determining antidiscrimination claims. Implicit in Congress' decision to permit employment discrimination claims to be brought in a number of different forums is its assumption, voiced by Senator Javits, that res judicata would prevent relitigation once a *judicial* determination had been reached in one of the available forums.[53]

Unable to find in the legislative history any indication that Congress intended to exempt Title VII plaintiffs from the

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[53] The Government's brief suggests, at 14, that Congress' intent will be negated, and Title VII "eviscerate[d]", if the result below is affirmed. This is because a state court judgment of dismissal following an employee's appeal is asserted to be indistinguishable from one following an employer-initiated appeal. In the latter case, res judicata and 28 U.S.C. §1738 would bar federal litigation of a Title VII claim even though the employee—for whose benefit Title VII was enacted—never affirmatively sought to invoke the state judicial process.

There are several answers to this hypothetical "horrible". First, this case does not involve that situation. Whether an affirmance in this case would require the result decried by the Solicitor General is a question which this

operation of section 1738, petitioner reads several decisions of the Court as sanctioning the radical departure he advocates from the established rule. Petitioner's interpretation of this Court's Title VII jurisprudence, however, is based upon a misreading of the cases, is not required in order to maintain the integrity of

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Court will undoubtedly address in the future, not in the abstract, but in the context of an actual statutory scheme and live case and controversy.

Because of the wide variety of statutory schemes created by the different states to combat employment discrimination, it is simply speculative whether, in any given case, the involuntariness of the employee's participation in the state judicial process should outweigh the presumptive reliability of state court reversal of an agency's finding in an employee's favor (which, in New York, at least, can only occur after a public hearing). *Allen* v. *McCurry, supra*, 449 U.S. 90.

Second, the hypothetical raised by the Government is disturbing only if it is assumed that Congress enacted Title VII out of distrust for the state courts and *solely* in order to provide a (friendly) federal forum for the benefit of employees. Such, however, is not the case; Congress respected genuine state efforts at eradicating discrimination (of which New York was a model) and provided for Federal court trials at least in part to shield employers from the EEOC (thought to be biased in favor of employees). Congress, moreover, evidenced a concern that "localities hostile to civil rights might enact sham discrimination ordinances for the purpose of frustrating the vindication of federal rights." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 763 (1979). This concern—itself indicating that Congress recognized the preclusive effect that a state court judgment would have—can be protected against by a stringently limited exception to preclusion (which would, at least, find support in Title VII's legislative history) in the case of bad faith or collusive "entrapment" of a complainant in a sham state or local anti-discrimination statute or ordinance. No one has ever suggested that New York's Human Rights Law is such a statute.

Third, the "untenability" of the distinction advanced in *Mitchell, supra*, between employee-initiated and employer-initiated appeals, is far from apparent, especially when one heeds this Court's admonition that repeal of an earlier statute (*i.e.*, §1738) "is to be regarded as implied only if necessary to make [a later enacted statute; *i.e.*, Title VII] work, and even then only to the minimum extent necessary". *Radzanower* v. *Touche Ross & Co., supra*, 426 U.S. at 155, *quoting Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 357. If according res judicata effect to state court dismissals of employment discrimination claims would, in the case of employer-initiated appeals, "eviscerate" Title VII, then Title VII can—to that "minimum extent necessary"—be read to override §1738. To thus harmonize the two policies—as *Mitchell* suggests—would give effect to both statutes. To reverse the decision below, however, because of a speculative evisceration of Title VII under a case not before this Court would be unnecessarily to gut §1738 and rescind two-hundred years of jurisprudence.

Title VII, and would create a spurious and unnecessary conflict with section 1738.

Petitioner relies primarily upon *Alexander* v. *Gardner-Denver, supra*, and secondarily upon *Chandler* v. *Roudebush*, 415 U.S. 840 (1976) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). None of these cases, however, dealt at all with: (1) prior state proceedings—either administrative or judicial, (2), any prior judicial proceeding, (3) section 1738, and principles of res judicata applied to a judgment, or (4) issues of state-federal relationships and powers.

Alexander v. *Gardner-Denver, supra*, dealt only, as the Court stated in the opening paragraph of its opinion, with "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements . . . ." 415 U.S. at 38. The question of preclusion in that case involved not section 1738, which is inapplicable to an arbitral decision, but rather what weight should be accorded to a determination made by an arbitrator, who "has no authority to invoke public laws", but only "authority to resolve . . . questions of contractual rights. . . ." 415 U.S. at 54.[34]

Chandler v. *Roudebush, supra* and *McDonnell-Douglas Corp.* v. *Green, supra*, both considered the preclusive effect to be given to a determination by a federal agency, the EEOC, and in both cases the Court concluded that the District Court could not merely review the EEOC's determination in an appellate capacity, but was required to ascertain the facts itself. It scarcely need be noted that such a holding is not a holding that a prior state court judgment can be disregarded.

Alexander v. *Gardner-Denver, Chandler* v. *Roudebush*, and *McDonnell Douglas Corp.* v. *Green*, in short, all examine the relationships between the federal courts and forums whose determinations are not subject to 28 U.S.C. §1738. *Allen* v.

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[34] The Court also based its decision on the ground that it would be manifestly unfair to hold that an employee could "waive" his Title VII rights via a collective bargaining agreement, where such a decision would be made by union-management negotiations, not by a personal, knowing decision

McCurry, supra, not those decisions, is the surer guide when the prior decision is that of a forum to which §1738 applies.

Finally, petitioner also relies upon *New York Gaslight Club, Inc.* v. *Carey, supra*, in which this Court determined that an individual who had successfully prosecuted an employment discrimination claim through New York's agencies and courts could, in a suit under Title VII, recover an award of attorneys' fees for work done in the state proceedings. While the Court did not especially address the issue, it was implicit in its decision that the favorable disposition of the employment discrimination claim by the state tribunals was dispositive of the merits of that claim for purposes of Title VII as well. This is necessarily so, because otherwise the employer would have been entitled to relitigate the merits of the Title VII claim in contesting the award of attorneys' fees which is authorized by Title VII, but not by the New York law. Unless this reading of *New York Gaslight Club* is incorrect, the petitioner here can prevail only if the preclusive effect of state court proceedings on the merits depends on whether the claimant or the employer wins. Nothing in 28 U.S.C. §1738 or in Title VII justifies such unequal treatment of parties, both of whom had the opportunity to and did litigate the validity of the discrimination claim in state court.

III. Denying Binding Effect to the Judgment of the Appellate Division Would Be Inconsistent with Basic Tenets and Values of Comity and Federalism.

Recognizing, perhaps, that Title VII does not explicitly override the significant interests of repose, comity, and federalism which find expression in 28 U.S.C. §1738 and common law doctrines of preclusion, petitioner argues that according binding effect to the Appellate Division's judgment will actually impinge on those interests.[35] (Pet. Brief, at 9, 20, 22, 25.) Petitioner reasons that, if the decision below stands, the EEOC and state agencies "will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in

[35] The government's brief sounds the same theme, at pp. 13, 23.

Federal Court". (Pet Brief, at 25 n. 20.) This, in turn, will discourage complainants from seeking state court review of their claims, resulting in a deterioration in the overall quality of the state administrative process and an increase in the federal court caseload. *Id.*, at 25.[56]

In addition to omitting from the equation Chemico's right to be free from the vexation of repetitious litigation, petitioner's calculus is paradoxical in several respects. He assumes (without empirical basis) that complainants will abandon the state judicial process and then laments that hypothetical abandonment of a process the intrinsic worthlessness of which is essential to his central argument (*viz.*, that Appellate Division review is no more than a rubber stamp of inadequate administrative procedures). He warns that, without judicial review, the integrity of the state administrative process will deteriorate; yet the thrust of his appeal is that that process already is without integrity. He asserts (Pet. Brief at 9, 20), that Congress, in enacting Title VII, intended to encourage full use of state remedies (*including appeals to state courts*), yet overlooks the 60-day limit built into its deferral provision. 42 U.S.C. §2000e-5(c).

Moreover, the result advocated by petitioner, by permitting relitigation in federal court of claims disposed of by state court judgments, would deprive the Appellate Division's judgment of the binding effect to which it is entitled. Thus, even assuming that the decision below will diminish resort to state remedies, the result sought by petitioner would, by denigrating state courts and legislative schemes, have a far more damaging effect on

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[56] By asserting that future complainants "will soon learn not to blunder across the line from state agencies to state courts" (Pet. Brief, at 25), petitioner unwittingly undermines the argument which implicitly underlies his case: that preclusion of a plenary federal trial based upon the inadvertent pursuit of state appellate remedies constitutes an unfair "trap for the unwary." *See* Pet. Brief, at 26. The bright-line test developed in *Mitchell* and in this case by the Second Circuit clearly obviates that danger in the future, robbing petitioner's argument of its force. The standard advocated by petitioner, on the other hand, whereby this Court would accord full faith and credit to state court judgments on a case-by-case basis and only after assessing the fairness of each state's treatment of each complainant's grievance, offers the prospect of uncertainty and, consequently, of unfairness.

principles of federalism and comity. *Cf. Board of Regents* v. *Tomanio*, 446 U.S. 478, 488, 491-92 (1980).[57]

And, to the extent that Appellate Division review ensures the fairness and efficacy of the state administrative procedures, it cannot be gainsaid that that review will be more searching and effective if the agency and the members of the reviewing court believe that the review is binding and, therefore, meaningful.

The prediction of increased federal dockets is similarly ironic. The assumption that more federal Title VII cases will be instituted if the Second Circuit's decision below is affirmed can only rest on the premise that a substantial number of complainants who might otherwise appeal *and win reversals from the Appellate Division* will now proceed directly from the NYHRD to federal court.[58] The hypothetical bypass of state court remedies would, therefore, be significant—in terms of federal caseloads—only if it is assumed, contrary to petitioner's own views, that the Appellate Division effectively polices the NYHRD. Petitioner's warning that the federal dockets will become congested as the result of the decision below is, therefore, fundamentally at odds with his belief that the Appellate Division rubber stamps administrative dismissals of discrimination claims.[59]

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[57] In *Board of Regents* v. *Tomanio*, *supra*, this Court enforced the tolling provision of New York's statute of limitations, holding that an action pursuant to 42 U.S.C. §1983 was time-barred despite the prior maintenance of related state court proceedings. The court below had refused to apply New York's tolling provision (which did not toll the statute during the pendency of the state litigation), reasoning that considerations of federalism would be undermined by the adoption of a tolling rule which would discourage resort to state remedies prior to the institution of a federal civil rights suit under §1983. This Court unequivocally rejected that reasoning, holding that the disregard of New York's tolling provision would be far more deleterious to federalism. It is equally unavailing to contend, as does petitioner, that disregard of the Appellate Division's judgment (deemed final and binding both by the New York legislature and courts) would, by theoretically encouraging full use of state remedies, further the goals of federalism.

[58] If the decision below were reversed, complainants *unsuccessfully* appealing to the Appellate Division could and would still proceed to federal court.

[59] In a different vein, petitioner asserts that, even if the result below does achieve a conservation of federal court resources, it would do so—unacceptа-

Petitioner's public policy arguments for denying preclusive effect to the Appellate Division's judgment are, thus, based upon self-contradictory assumptions and unsound logic. Even more fundamentally, these arguments overlook the fact that the doctrine of res judicata itself "serves vital public interests" and constitutes a "rule of fundamental and substantial justice", to which prudential exceptions do not apply. *Federated Department Stores, Inc.* v. *Moitie, supra*, 101 S.Ct. at 2429 (1981).

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's *ad hoc* determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser* v. *Woodruff*, 327 U.S. 726, 733.

Id.

By uniformly applying this well-recognized rule to the judgments of state courts, federal courts further both the states' interest in the finality of their judgments and the interests of federalism and comity, which require that full faith and credit

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bly—"at the expense of the unwary and the uninformed". (Pet. Brief, at 26.) Judicial economy might result, but "[p]*ro se* plaintiffs like petitioner [would be] especially likely to fall into *Sinicropi*'s trap". *Id.* Thus, reasons petitioner, if the price of judicial economy is that Title VII plaintiffs "must settle for a cursory state administrative procedure and a sharply restricted state court review . . . then the price is too high." *Id.* Of course, this overlooks petitioner's own concession that, if the decision below stands, the EEOC and state agencies "will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in Federal Court" (Pet. Brief, at 25 n. 20), with the result that plaintiffs will no longer "blunder across the line from state agencies to state courts." *Id.*, at 25. Thus, it is simply untrue that the decision below means that Title VII complainants "must" settle for administrative procedures and state court review. They will remain free—as was petitioner—to move directly from the state agency to the federal courthouse. The contrary result, contended for by petitioner, would result in a duplication of judicial effort which Congress never contemplated and, indeed, which one of the legislators most involved in the 1972 debates over Title VII (Sen. Javits) explicitly rejected. *See* pages 35-36, *ante*.

be accorded to final judgments arrived at by state courts of competent jurisdiction. In serving these weighty interests, the decision below trenches on no significant interests of Title VII complainants, who remain free to pursue their state administrative remedies and their subsequent federal plenary actions.

CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT LAYTON
Counsel of Record
50 Rockefeller Plaza
New York, New York
10020
(212) 586-4300
Attorney for Respondent

Of Counsel:
DANIEL J. BROOKS
THOMAS L. ABRAMS
LAYTON and SHERMAN
50 Rockefeller Plaza
New York, New York 10020
October 15, 1981

SUPPLEMENTAL APPENDIX

Note: Certain of the documents printed in this Supplemental Appendix, pursuant to Rules 30 and 33 of this Court, contain handwritten marginalia, some of which are illegible. We have not attempted to print these marginalia. The original documents can be read in the Record on file with the Court.

NYHRD NOTICE OF CONFERENCE, JULY 30, 1976, ENCL. 2 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE DIVISION OF
HUMAN RIGHTS
on the complaint of

RUBIN KREMER
Complainant,

—against—

CHEMICAL CONSTRUCTION CORPORATION
Respondent

NOTICE OF CONFERENCE AND PRODUCTION OF RECORDS
(Investigation of verified complaint)
Case No.
IA-E-AC 3576-76E

TO: Mr. Rubin Kremer
3741 Mathews Avenue
Bronx, New York 10467

YOU ARE HEREBY NOTIFIED to appear and attend before MARTHA GARLAND, FIELD REPRESENTATIVE duly designated herein of the New York State Division of Human Rights, at his office, 270 Broadway, New York, N.Y. 10007, Room 922, 9th floor, State of New York, on August 12, 1976, at 10:00 A.M. for a conference in connection with the investigation in the above-entitled proceeding wherein the respondent has been charged with an unlawful discriminatory practice relating to EMPLOYMENT in violation of Section 296 of the Human Rights Law. You may bring a lawyer if you desire, but it is not necessary for you to do so. HOWEVER, THE OTHER SIDE CAN BRING A LAWYER AND IS SO ADVISED.

Please bring with you all witnesses, books, papers, records and documents pertaining to this matter, including:

Dated: JULY 30, 1976

STATE DIVISION OF HUMAN RIGHTS
By: /s/Martha Garland
Field Representative
Phone No. 488-5828

Human Rights Law (Executive Law, Art. 15).

"Sec. 295 General powers and duties of division. The division by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:

7. To * * * subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under examination or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it."

KREMER LETTER OF AUGUST 22, 1975
ENCL. 3 TO KREMER LETTER OF JUNE 15, 1978,
ATTACHMENT 3 TO COMPLAINT

August 22, 1975

Dr. Thomas Gibian
Chemical Construction Corp.
One Penn Plaza
New York, New York 10001

Dear Dr. Gibian:

I am not too happy to write memos like this, I never did it before, but please read.

On July 31 I was informed by Mr. E. Paul that starting from August 1, 1975 I will be laid off. Because this lay off is a result of a long time period of conspiracy by Mr. Janoz Puc and Mr. Karl was accepted by Mr. E. Paul as a tool of power, I decided to appeal to you.

I have made this clear to the Personnel Manager, Mr. W. Magee, at the end of March 1975 when Mr. E. Paul informed me "painful" that I am laid off. This notice was cancelled.

At this time Mr. Paul found that because this lay off is a "mass action" I will not be able to blame anybody and he put my name on the list as "undesireable" employee. It would be adviseable to remark that on July 31, 1975 before Mr. Paul told me that I am laid off, the Project Engineer of Coalcon whom I handed the information concerned the methanation section of the flow being satisfied, told me that they have a lot of work and gave me the next part to work on.

Unfortunately, I had not the possibility to meet you because your secretary told me that you are busy and that you are unable to see me and sent me to the Vice President of Personnel. The Vice President of Personnel could not see me because he was preparing himself for an overseas trip.

And so I was thrown out.

Being the victim of a conspiracy should not be a reason for lay off (or firing) and should not succeed even if the victim is stateless. I would like to ask you to give me the opportunity to meet you in person and to give you further explanations which may be of great interest and useful to you. I hope that after that you will be able to draw the right conclusions. All laid off in Dept. 153 on August 1, 1975 are rehired. I think that it would be adviseable to report Mr. K. Hou's statement addressed to me before I left the company. "The time is come".

Thank you.

Sincerely,

R. Kremer

2741 Matthews Avenue
Bronx, New York 10467
Tel. 212-231-8229

Encl.: Resume

CHEMICO LETTER OF SEPTEMBER 15, 1975, ENCL. 5 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation

An
Aerojet-
General
Company

One Penn Plaza
New York, N.Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

September 15, 1975

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

As we discussed during our telephone conversation on Friday, September 12, there is unfortunately no appropriate opening at Chemico for you at this time. I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist. It is indeed unfortunate after your two years of service at Chemico that you were laid off, and while such action is always difficult to live with, you must understand that these actions resulted from the current economic crises which Chemico is faced with. When such conditions improve I will be most happy to contact you as regards employment. It is most difficult to anticipate when that might be however.

As you requested I am forwarding a copy of your letter to Mr. Gibian, whom I am sure you will hear from shortly. May I extend an offer to help you in any way possible in your search for a new assignment.

Sincerely,

/s/ J. Kevin Coleman
Vice President
Employee Relations

JKC:bm
Enclosure

cc: T.G. Gibian

NYHRD LETTER OF AUGUST 18, 1976, ENCL. 8 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

August 18, 1976

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, NY 10467

Re: Your case against Chemical
Construction Corporation
Case No. Ia-R-AC-3576-76E

Dear Mr. Kremer:

A field investigation report has been prepared in reference to the above-named case.

Please contact this office on or before August 31, 1976, to review Exhibits and statements presented by the respondents.

Yours truly,

/s/Martha L. Garland
Field Representative
Tele: 488-5828

MLG:mkh

cc: Dr. Pohly, Community Consultant
Anti-Defamation League
315 Lexington Avenue
New York, NY 10016

KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

May 10, 1977

Rubin Kremer
c/o N. Rosenberg
762 Brady Ave. Apt. 127
Bronx, New York, N.Y. 10462

The State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Case Nos. Ia-E-AC-3576-76E
E-AC-42821-76E

Gentlemen:

I would like to ask the State Human Rights Appeal Board to reconsider the question under investigation, and to annull the decision of the New York State Executive Department, Division of Human Rights, at 270 Broadway, N.Y., dated April 28, 1977 on the following ground.

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place and within 338 days the H.R.D. was unable or unwilling to bring the parties together.

2. On August 24, 1976 during a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false.

3. The Field Representative Ms. Martha Garland failed to include in her "Complainant's Rebuttal to correspondent's" the basic information surrounding my termination, e.g., the people hired and rehired in August 1975 after my termination and other information which I submitted to her then.

4. The Basis for no Probable Cause, prepared by Field Representative Ms. Martha Garland are untrue and tendentious.

5. Mr. J. Kevin Coleman, Vice President of Employee Relations of Chem. Constr. Corp. in his letter of September 15, 1976 stated "I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist "and" you were laid off . . . you must understand that these actions resulted from the current economic crises which Chemico is faced with". There is no statement that I was laid off because of seniority.

6. Dr. Thomas G. Gibian, President of Chemico in his letter of September 24, 1976 stated "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel". There is no statement that I was laid off because of seniority. Mr. J. Kevin Coleman and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

7. Based on Dr. Th.G. Gibians statement and on Chemico's advertisement in The New York Times I applied for a job with Chemico:

—on November 2, 1975, Ad. on Nov. 2, 1975
—on May 21, 1976, Ad. on May 16, 1976
—on July 16, 1976, Ad. on July 11, 1976
—on August 15, 1976, Ad. on August 15, 1976
—on September 8, 1976, Ad. on September 5, 1976

All the positions advertised correspondent exactly with my background and qualifications. In all cases I was turned down or there was no answer at all.

8. Mr. Don R. Steenland in his letter of September 17, 1976 to the N.Y. State Div. of Human Rights stated "In summary, I would like to reastate the fact that Mr. Kremer was not let go for religious or age discrimination reasons, but merely as a function of both lack of work in his area as well marginal ability. Further

we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico".

9. Mr. John Puc, former supervisor, despite his negative attitude towards me, in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties."

There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

10. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down "by someone who has power."

11. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Plant Co./CPPC/in August 1975.

—Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Department 153 of CPPC.
—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.
—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.
—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

12. There was no lack of work in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, Mr. John Puc and E. Paul to remove me from the Company on August 1, 1975.

Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

13. Seniority was not a criteria in any Department of CPPC during the lay-off and the rehire action.

14. After an investigation on Nov. 9, 1976 Ms. Lillian H. Fennel, Regional Director of the Human Rights Division stated "you were fired because you are Jewish not because of your age."

Mr. George C. Findlay, Regional Director of the H.R.D. during a brief appointment at the end of March 1977 told me "your case looks favourable".

Therefore I ask the State Human Rights Appeal Board the following:

A. To reconsider this case from the beginning.

B. To call together the parties involved for a recorded hearing.

C. To examine the following witnesses in my presence in the order listed below. [See next page].

D. To annul this lay off on August 1, 1975 and to adjudge full compensation for the time I was unable to get a job.

Sincerely,

/s/R. Kremer

Encl.: 5 copies of appl. for
a job with Chemico.

C. To examine the following witnesses in my presence in the order listed below.

1. Mr. John Puc, Supervisor, Chemical Process Plant Co., One Penn Plaza, New York, N.Y. 10001

2. Mr. E.V. Paul, Supervisor, Chem. Process Plant Co., One Penn Plaza, New York, N.Y. 10001

3. Mr. Carls, Vice President, Coalcon, One Penn Plaza, N.Y. 10001

4. Mr. L. Livolsi, Vice President, Chem. Process Plant Co., N.Y. One Penn Plaza, 10001

5. Mr. J. Kevin Coleman, Vice Pres. Employee Relations, Chem. Construction Corp., One Penn Plaza, N.Y. 10001

6. Dr. Thomas G. Gibian, President, Chemical Construction Corporation, One Penn Plaza, New York, 10001

7. Mr. Parish Shah, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

8. Mr. Navin Shah, Employee, Chem. Process Plant Co., One Penn Plaza, New York, N.Y. 10001

9. Mr. Tapan Barnerjee, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

10. Mr. Krishma Raj, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

11. Mr. Don Steenland, Personnel Director, Chem. Construction Corporation, New York, N.Y. 10001

12. Ms. Klara Balmazi, Employee, Badger Co., Boston, Mass.

13. Dr. Henry Pohly, Anti-Defamation League, 315 Lexington Ave., New York, N.Y. 10016

KREMER LETTER OF NOVEMBER 2, 1978, ATTACHMENT 1 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11, ATTACHMENT 3 TO COMPLAINT

November 2, 1975

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

CHEMICAL PROCESS PLANTS CO.
PERSONNEL DEPARTMENT
ONE PENN PLAZA
NEW YORK, N.Y. 10001

MR. D. R. STEENLAND

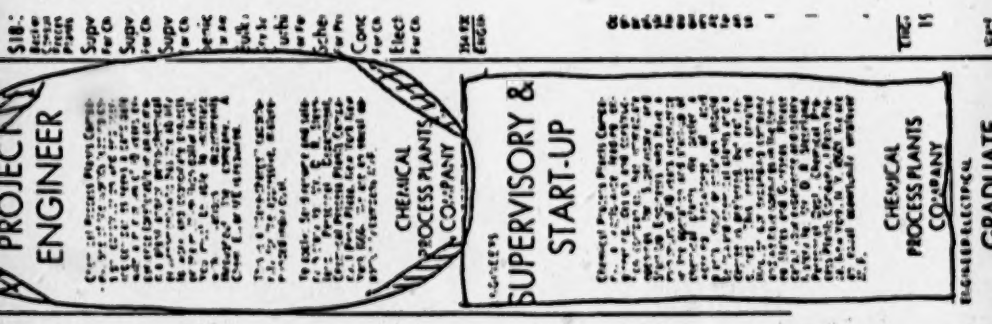
Dear Mr. Steenland:

In response to your advertisement in The New York Times on November 2, 1975 I am sending you my resume for your consideration and I am looking forward to hearing from you.

Sincerely,

/s/R. Kremer

cc: J. Kevin Coleman
Vice President
Employee Relations



KREMER LETTER OF MAY 21, 1976,
ATTACHMENT 2 TO KREMER LETTER
OF MAY 10, 1977,
ENCL. 11, ATTACHMENT 3 TO COMPLAINT

May 21, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. S.R. Button, Personnel Dept.

Dear Mr. Button:

With reference to your advertisement in The New York Times on May 16, 1976 I am sending you my resume and I am looking forward to hearing from you.

Sincerely,

R. Kremer

ENGINEERING OPPORTUNITIES WITH COALCON

Coalcon is an affiliate of Union Carbide and a subsidiary of Air/Jet/General. This new energy conversion company has been awarded the largest ERDA coal conversion contract in existence and has immediate needs for project engineers and managers to plan and direct the design of plants producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS: These positions require 10 plus years experience with engineering contractor firms and strong technical background in the design and erection of chemical process plants and refineries.

PROJECT MANAGERS: We require 10-15 years with engineering contractor firms and the ability to monitor technical input from engineers and subcontractors. Prior coal conversion experience a plus.

ENGINEERING DESIGN SUPERVISORS: We seek 10 or more years experience for openings in all design disciplines.

We are currently located in mid-Manhattan and anticipate relocating to Northern New Jersey by Jan. 1. These positions are immediately available and offer competitive salaries and comprehensive benefits. For prompt consideration, forward a complete resume in confidence to: Mr. S.R. Button, Personnel Department, Coalcon, 1 Penn Plaza, New York, N.Y. 10001. We are an equal opportunity employer, m/f.

COALCON

KREMER LETTER OF JULY 16, 1976, ATTACHMENT 3 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 OF COMPLAINT

July 16, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. D.R. Steenland, Personnel Dept.

Dear Mr. Steenland:

This is to request your consideration of my qualifications for employment for one of the openings listed in your ad in the New York Times on July 11, 1976.

As the enclosed resume indicates, all the openings suit exact with the requirements in your advertisement.

Please note, that Mr. J. Kevin Coleman, Vice President of Employee Relations of Chemical Construction Corporation in his letter of September 15, 1975 emphasized the following:

"I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist".

Therefore, your conclusion in your letter of June 10, 1976 concerned my qualifications as a result of a discussion with my former supervisor, who had no influence on the job which I performed is unacceptable.

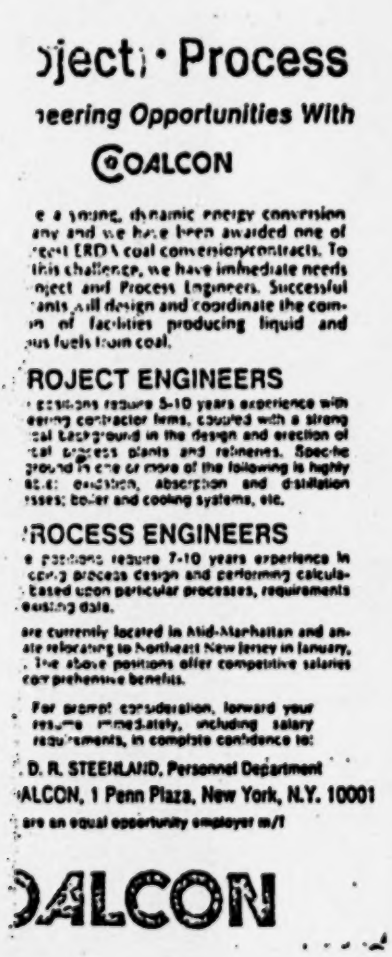
But even if your conclusion is based on reliable and honest information all the openings listed in your ad on July 11, 1976 are working positions not supervisory.

I hope that my past experience may entitle me to favorable consideration.

I am looking forward to hearing from you.

Sincerely,

R. Kremer



ɔjectɨ · Process

ɪeering Opportunities With

COALCON

e a young, dynamic energy conversion
any and we have been awarded one of
ɾecent ERDA coal conversion contracts. To
this challenge, we have immediate needs
ɔject and Process Engineers. Successful
ɾants will design and coordinate the com-
ɪn of facilities producing liquid and
ous fuels from coal.

ROJECT ENGINEERS

ɾ positions require 5-10 years experience with
eering contractor firms, coupled with a strong
ɾal background in the design and erection of
ɾal process plants and refineries. Specific
ground in one or more of the following is highly
ɑ.d: gasification, absorption and distillation
ɾsses; boiler and cooling systems, etc.

ROCESS ENGINEERS

e positions require 7-10 years experience in
ɔping process design and performing calcula-
based upon particular processes, requirements
existing data.

are currently located in Mid-Manhattan and are
ɑte relocating to Northeast New Jersey in January.
. The above positions offer competitive salaries
ɔrehensive benefits.

For prompt consideration, forward your
ɾsume immediately, including salary
ɾquirements, in complete confidence to:

D. R. STEENLAND, Personnel Department
ALCON, 1 Penn Plaza, New York, N.Y. 10001
are an equal opportunity employer m/f

ALCON

COALCON JOB ADVERTISEMENT, AUGUST 15, 1976, ATTACHMENT 4 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 OF COMPLAINT

COALCON

• Engineering • Technical • Financial

Career Opportunities

We are a young, dynamic energy conversion company and we have been awarded one of the largest ERDA coal conversion contracts. To meet this challenge, we have immediate needs for the following personnel.

☐ **ENGINEERS** Successful applicants will design and coordinate the conversion of facilities producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS These positions require 5-10 years experience with engineering contractor firms, coupled with a strong technical background in the design and erection of chemical process plants and refineries. Specific background in one or more of the following is highly desirable: acid gas removal, sulphur recovery systems, methanation, piping analytical and distribution systems, distillation and fractionation.

PROCESS ENGINEERS These positions require 7-10 years experience in developing process design and performing calculations based upon particular processes, requirements and existing data.

☐ **ADMINISTRATION-PROJECTS** Engineering degree + 5-10 years experience in chem process projects, particularly with engineering contractor firms. Provide admin. assistance in area of reports, estimates, budgets, schedules and over-all monitoring.

☐ **COST ANALYST** Position requires 6-8 years experience. Control and report direct labor and charges incurred, analyze expenditures relative to budgets, audit subcontractor proposals, develop forecasts and estimates to complete. Should be engineering oriented.

☐ **SCHEDULING ANALYST** Position requires 5 years experience in CPM scheduling of large projects from design through production. Knowledge of computerized CPM techniques and related data processing.

☐ **SAFETY ENGINEER** Position requires 3-5 years safety engineering experience directly related to facilities design, preferably in the chemical or petroleum industry. Experience in an operating company would be preferred. We will require expertise in the areas of fire protection, industrial hygiene and multi-hazards analysis.

We are currently located in Mid-Manhattan and anticipate relocating to Northeast New Jersey in January, 1977. The above positions offer competitive salaries and comprehensive benefits.

For prompt consideration, forward your resume immediately, including salary requirements, in complete confidence to:

MR. D. R. STEENLAND, Personnel Department
COALCON, One Penn Plaza, New York, N.Y. 10001

We are an equal opportunity employer m/f

KREMER LETTER OF SEPTEMBER 8, 1976, ATTACHMENT 5 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 of COMPLAINT

September 8, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. D.R. Steenland

Dear Mr. Steenland:

In response to your advertisement in The New York Times on September 5, 1976 I am sending you my resume and I am looking forward to hearing from you.

Sincerely,

Rubin Kremer

September 5, 1976

F 19

Engineering • Technical • Financial
Career Opportunities

COALCON

We have continuing needs for personnel to join our young, dynamic energy conversion company. To staff our organization for the fulfillment of one of the largest ERDA coal conversion contracts, we have immediate requirements for the following:

☐ **ENGINEERS** Successful applicants will design and coordinate the completion of facilities producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS These positions require 5-10 years experience with engineering contractor firms, coupled with a strong technical background in the design and erection of chemical process plants and refineries. Specific background in one or more of the following is highly desirable: acid gas removal, sulfur recovery systems, methanation, gas analysis and distribution systems, gasification and fractionation.

PROCESS ENGINEERS These positions require 7-10 years experience in developing process design, and performing calculations based upon particular processes, requirements and operating data.

☐ **PURCHASING** Subcontract Administrators/Buyers. Positions require 10-15 years experience. Perform bid and cost price analyses; negotiation in the preparation of contracts; and recommendations for awards to sub-contractors. Knowledge of DOD, NASA, AEC, Federal procurement regulations.

☐ **COST ANALYST** Position requires 6-8 years experience. Control and report direct labor and charges incurred, analyze expenditures relative to budgets, audit subcontractor proposals, develop forecasts and estimates to complete. Should be engineering oriented.

☐ **ACCOUNTING** ***SENIOR:*** Degree + 6-8 years public/private accounting experience. Familiar with cost/fund accounting, with knowledge of APB and FASB pronouncements. Position involves complete responsibility for all records/reports including taxes.

JUNIOR: Degree + 3-5 years experience, with some knowledge of accounting systems.

☐ **SAFETY ENGINEER** Position requires 3-5 years safety engineering experience directly related to facilities design, preferably in the chemical or petroleum industry. Experience in an operating company would be preferred. Will require expertise in the areas of fire protection, industrial hygiene and multi-hazards analysis.

We are currently located in Mid-Manhattan and anticipate relocating to Northeast New Jersey in January, 1977. The above positions offer competitive salaries and comprehensive benefits.

For prompt consideration, forward your resume immediately, including salary requirements, in confidence to:

MR. D. R. STEENLAND, Personnel Department
COALCON, One Penn Plaza, New York, N.Y. 10001

We are an equal opportunity employer m/f

KREMER PETITION FOR REVIEW, DECEMBER 5, 1977, ENCL. 12 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Rubin KREMER,

Petitioner-Appellant

v.

NOTICE OF PETITION

The State Division on Human Rights,
The State Human Rights Appeal Board
and Chemical Construction Corporation,

Respondents.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Rubin Kremer, verified the 6 day of December, 1977, an application will be made at a term of this court to be held at the courthouse thereof, located at Madison Avenue and 25th Street, Borough of Manhattan, City of New York, on the 28 of December, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to §298 of the Human Rights Law and pursuant to CPLR Article 78, setting aside the determination and order made by respondents dismissing petitioner's complaint of an unlawful discriminatory practice and denying his reinstatement as a piping analytical engineer with Chemical Construction Corporation, and compelling said respondents to reinstate petitioner as such engineer, and awarding his back pay, and for such other and further relief as may be deemed just and proper.

Dated: December 5, 1977
New York, N.Y.

YOURS, etc.

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, New York 10462

Tel.: 892-1322

TO: Chemical Construction Corporation
Mr. Don Steenland, Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
FIRST JUDICIAL DEPARTMENT

RUBIN KREMER

Petitioner,

—against- PETITION

THE STATE DIVISION OF HUMAN RIGHTS, THE STATE HUMAN RIGHTS APPEAL BOARD, and CHEMICAL CONSTRUCTION CORPORATION,

Respondents.

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

Petitioner, Rubin Kremer, respectfully alleges:

1. Petitioner was employed by Chemical Construction Corporation as a piping analytical engineer from June 25, 1973 until August 1, 1975.

2. Petitioner was told that he was laid off due to lack of work. In August of 1975, petitioner learned that several people were hired and rehired in the piping analytical department.

3. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Co. [CPPC] in August 1975.

—Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Department 153 of CPPC, and did not work on the Russian ammonia job [2008].

—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

4. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of Employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down. There was no lack of work in this area in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, John Puc and E. Paul to remove me from the Company on August 1, 1975. Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

5. I am 60 years of age and of Jewish faith. The people hired and rehired are much younger than I, and previous to my being laid off I was the only Jewish person in the piping analytical department.

6. Mr. Don Steenlands statement that respondent's Company presently [August, 1976] has 25 Jewish people on the payroll could not prevent Mr. E. Pauls action to remove me from the Company on August 1, 1975, accepted by the Management of Chemical Construction Corporation.

7. On August 22, 1975, petitioner applied to the President of Chemical Construction Corporation, Dr. Thomas G. Gibian for reinstatement as a piping analytical engineer, but such application was rejected.

8. Dr. Thomas G. Gibian, President of Chemico in his letter to the petitioner of September 24, 1975 stated, "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel".

Mr. J. Kevin Coleman, Vice President of Employee Relations and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

9. Based on Dr. Th.G. Gibians statement and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

—on November 2, 1976, Ad. on Nov. 2, 1975
—on May 21, 1976, Ad. on May 16, 1976
—on July 16, 1976, Ad. on July 11, 1976
—on August 15, 1976, Ad. on August 15, 1976
—on September 8, 1976, Ad. on September 5, 1976

All the positions advertised correspondent exactly with my background and qualification. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contended. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

10. Mr. John Puc, former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties." There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

11. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve communicat." One month later on July 27, 1975 in order to remove me from the Company my performance rating became "Below Average".

It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

12. On May 6, 1976 petitioner filed a charge of discrimination against Chemical Construction Corporation, with the United States Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964; and said Commission, pursuant to Section 706/b/ of such Act, referred the matter to the Division of Human Rights of the State of New York.

13. On May 20, 1976 petitioner filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against him by refusing to reemploy him as a piping analytical engineer because of his age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

14. After the filing of the aforesaid complaint on May 20, 1976, the following proceeding ensued:

a. Pursuant to notice from the State Division of Human Rights of July 30, 1976 the Conference for Conference and Production of Records on August 12, 1976 did not take place.

b. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, conducted before Martha Garland, a Field Representative of such Division. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false [Exhibits C, D, F and H]. The Field Representative failed to include in her "Complainants Rebuttal" the basic information surrounding my termination.

c. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. During this investigation I informed her, between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab boycott.

After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age.

There is no record in the file that this investigation took place.

d. Mr. George C. Findlay, Regional Director of the Human Rights Division during a brief appointment at the end of March, 1977 stated "Your case looks favorable". There is no record in the file that this appointment took place.

e. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed petitioner's complaint on the ground that "The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

f. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

g. By notice dated May 10, 1977, petitioner appealed said determination to the State Human Rights Appeal Board.

h. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

i. It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain petitioners brief to the Appeal Board dated May 10, 1977.

The Appeal Board did not examine the witnesses listed on page 5 of said brief.

15. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules.

16. Said determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice, since it did not begin to run until after the denial of reinstatement.

17. By virtue of the aforesaid, petitioner was deprived of the compensation he would have received had he been reinstated, together with the normal increments to such compensation, and he has suffered damages thereby in the amount of about FORTY THOUSAND AND 00/100 DOLLARS and accrued interest.

18. The aforesaid acts on the part of CHEMICAL CONSTRUCTION CORPORATION, discriminated against petitioner by reason of his age and creed in violation of Section 296 of the Human Rights Law of the State of New York.

19. The petitioner is entitled to be reinstated as a piping analytical engineer or equal with Chemical Construction Corporation, and he is wrongfully and unlawfully being denied right to such employment, and petitioner continues to be wrongfully denied the said right, unless this Court annul the determination of the said Division of Human Rights and the order of the said Human Rights Appeal Board, and compel CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner, as such engineer.

20. No previous application for the relief sought herein has been made to any court or judge.

WHEREFORE, petitioner prays that a final judgment be made and entered herein, reversing, annulling and setting aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner as a piping analytical engineer or equal and that petitioner be so reinstated, and that petitioner be awarded damages

in the amount of about FORTY THOUSAND AND 00/100 [$40,000] DOLLARS and accured interest; and for such other and further relief as is just and proper, together with the costs and disbursement of this proceeding.

Dated: December 5, 1977
New York, New York

/s/Rubin Kremer
Petitioner

STATE AND COUNTY OF NEW YORK / SS:

Rubin KREMER, being duly sworn, deposes and says that he is the petitioner in the within action; that deponent has read the foregoing petition and knows the contents thereof; that the same are true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

/s/Rubin Kremer
Petitioner

Sworn to before me this
6th day of Dec., 1977

/s/Irving Goldberg
Notary Public

IRVING GOLDBERG
Notary Public, State of New York
No. 4830618
Qualified in Westchester County
Commission Expires March 30, 1978

AFFIDAVIT OF SERVICE

STATE OF NEW YORK /
COUNTY OF NEW YORK / SS:

Rubin Kremer, being duly sworn, deposes and says, that deponent is a party to the action, is over 18 years of age, and resides at

That on the 6th day of December, 1977, deponent served the within Petition and Notice upon the following, at the addresses indicated:

Chemical Construction Corporation
Mr. Don Steenland, Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

Said copies were served by depositing same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

/s/Rubin Kremer

Sworn to before me this
6th day of December, 1977

/s/Irving Goldberg

IRVING GOLDBERG
Notary Public, State of New York
No. 4830618
Qualified in Westchester County
Commission Expires March 30, 1978

NYHRD LETTER OF DECEMBER 15, 1977, ENCL. 16 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

December 15, 1977

Appellate Division of the Supreme Court
First Department
27 Madison Avenue
New York, N. Y. 10010

Attention: James Gilligan, Motion Clerk

Re: *Rubin Kremer v. Chemical Contruction Corp.*

Dear Mr. Gilligan:

This is a proceeding pursuant to § 298 of the Executive Law to review an order of the State Human Rights Appeal Board, affirming an order of the State Division of Human Rights that dismissed a discrimination complaint after preliminary investigation for lack of probable cause. The Office of General Counsel to the State Division of Human Rights is hereby submitting the certified record of administrative proceedings.

It is the policy of this Division that when a complaint has been dismissed by a Regional Director after preliminary investigation, rather than by the Commissioner after a formal hearing, the Office of General Counsel should not play an active role against the complainant if the latter appeals. Therefore, we are leaving to the real parties in interest, those who have been accused by the complainant of unlawful discrimination, the function of filing further papers in opposition to this proceeding.

Very truly yours,

ANN THACHER ANDERSON, General Counsel

By: ALAN J. SAKS, Associate Attorney

Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

ATA:AJS:es

cc: Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, N. Y. 10462

State Human Rights Appeal Board
Two World Trade Center
New York, N.Y. 10047

CHEMICO LETTER OF JUNE 10, 1976, ENCL. 17 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation
An Aerojet—General Company

One Penn Plaza
New York, N. Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

June 10, 1976

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

In response to your letter dated May 21, 1976, we wish to thank you for your continued interest in our company.

Unfortunately, a review of your record and a discussion with your former supervisor indicates, that while you were employed with Chemico, you did not exhibit the leadership skills necessary for the supervisory positions advertised.

Please be assured we will continue to review your file against any opening we consider you qualified for.

Sincerely,

/s/ Donald R. Steenland
Director of Employment

DRS/jh

DOCUMENT FROM NYHRD FILE, ENCL. 18 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

REBUTTAL

1. Complainant stated there was one other person besides himself laid off in the Process Anal. Eng. Dpt. namely Navin Shah. In addition he stated Exibit A as it is shown, was probably organized after August 1, 1975. To the best of his knoledge Dpt. Nos. 153 and 241 were the Piping Anal. Dpts.

2. Complainant stated that Mr. Parish Shah, did not work in the Piping Analytical Dpt., also to the best of his knowledge Mr. Parish Shah has not worked on the Russian Job. In addition if Mr. Shah was reinstated to work on the Ammonia Job as respondent alleged, he felt he could have been rehired because he was familiar with the Job.

   He contendet that Emerson Paul, Supervisor, had treated him unfairly since July, 1974 when he learned he was Jewish. Complainant stated that Michal Kramer Proj. Eng. of Coalcon told him that they had a lot of work when he worked for Coalcon. [R. Kremer woked for Coalcon three days]. However, complainant was not considered for rehire.

3. Complainant stated the advertisement that appeared in The New York Times did not state if a person's experience and background had to be in the U.S. as respondent contended. In addition he felt he had the experience that was required for a position as Proj. Eng. and Superv. [See Exhibit E]. Also the engineering positions that appeared in the New York Times on August 8, and 15th appears to have an opening for not only Proj. Eng. and Process Eng., but they had positions open for Eng. with background in producing liquid and gaseous fuels from coal [see exhibit K and G].

   Complainant contended his work performance was better than the other engineers because it was not necessary for him to repeat his work.

DOCUMENT FROM NYHRD FILE, ENCL. 19 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

October 6, 1976

Martha L. Garland

BASIS for NO PROBABLE CAUSE

The reasons are:

1. Investigation reveiled complainant was laid off on August 1, 1975 from the Process Analytical Engineering Department along with 14 other employees in his Department. Exh. [A + B]

2. Investigation reveiled that respondents Corporation has 37 people in its employ whom are 50 years of age and older. In addition twenty one of these employees were hired at age 50 Or over.

3. Investigation reveiled that complainant was the only Jewish employee in his department, however, respondent company *presently* has 25 Jewish people on the payroll which represents 13% of Chem. Con. Corp. work force. In addition persons of Jewish faith are employed throughout the company from managerial positions to clerks.

4. Investigation reveiled that Mr. Kremer's as a Project Engineer dates back prior to 1969 in Poland. His recent experience was limited to specific areas. [See exh. H].

   In addition respondents had the opportunity to observe complainant's work performance and they felt he could not handle the job of Project Engineer with the company [Exh.D]. [opinions of supervis]

DOCUMENT FROM NYHRD FILE, ENCL. 20 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Letter of Donald R. Steenland of September 17, 1976.

In summary, I would like to restate the fact that Mr. Kremer was not let go for religious or age discrimination reasons, but merely as a function of both lack of work in his area as well as his marginal ability. Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

I can only conclude and Mr. Kremer should give some thought to the fact that no other company has hired him either during all this time and every employer he's applied to can't be guilty of discrimination.

Mr. Puc's Opinion.

May 27, 1976

He was technically competent piping analytical Engineer with exelent background in other engineering branches such as process, exceeding the average experience of piping analytical Engineer. His performance was qualitatively very good.

Unfortunately his competence was offset by his slowness in performance of his duties.

At the time of lay off, the Piping Analytical force was cut 50%. Mr. Kremer was let go along with two other engineers. *One of the two was subsequently rehired along with another engineer from the Mechanical Department because both were needed to complete the work on Russian Ammonia Plants, and both were previously working on this project. Mr. Kremer was not considered for rehire simply because he was not involved with this project and piping analytical work on the projects he was working on was completed.* [I was working with Coalcon on Coal Gasification and the job just started.....]

DOCUMENT FROM NYHRD FILE, ENCL. 22 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Date— 7/29/75
Performance Rating.
Piping Engineering

Dept. 153 Piping Analytical

How, Karl	Competent	B
Kremer, R.	Below Average	D
Kumar, B.R.	Average	C
Puc, Jamez	Exelent	A
Razfar, N.	Competent	B
Shah, N.	Average	C

Dept 241. Stress, Hangers, and Supports.

Davidescu, G.	Competent	B
Madorma, J.	Exelent	A
Matlawski,	Competent	B
Raj, K.	Average	C

Dept. 242. Material Control 1

Abbiak, J.	Average	C
Fusco, E.	Below Av.	D
Linostrom, W.	Av.	C
Norman, R.	Competent	B
D'Arienzo, D.	Av.	C

Exhibit D6 — is based only on the opinion of Mr. E. Paul and J. Puc.

Note on application of June 20, 1976.
In his Folder. This guy never quits.

DOCUMENT FROM NYHRD FILE, ENCL. 24 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT C

On August 1, 1975 there was a total of 43 employees who were affected by the lay off. Of the 43 employees 35 employees were engineering personnel, 11 employees were in the piping area and two other employees besides Mr. R. Kremer were laid off in his department.

One of the employees in Mr. Kremer's department was called back. He was needed to complete the work of the Russian Ammonia Plants, since he had previously worked on this project. *Mr. Kremer was not considered for rehire, since he was not involved in this project and the work he was assigned to were complete.* The employee who was rehired, Mr. Navin C. Shah, had one more year service as well a better performance revies than Mr. Kremer. These are the specific reasons Mr. Kremer was not called back as was his associate Mr. Navin Shah. Another employee called back was Mr. Krishma Raj. However he was employed in the capacity as Eng. Ass. These are the only two employees who were laid off on August 1, 1975 who were recalled.

EXHIBIT D2

Performance revies which were completed on Mr. Rubin Kremer by his supervisors while he was working at Chemico. [very characteristic..... Please read it. No date.]

Exhibit D4 - Mr. Puc - Loyal and dependable, somewhat slow in performance. Stadily improving in efficiency. Rate -15400 [Rating 3]. Data - 6/23/74

Exhibit D3 Mr. E. Paul - Date 6/19/75
Because of his foreign background which required a certain rigor and exactness in processing engineering information, employee has been difficult to communicate with. He now has a better understanding and his work should prove more productive. Hold for his knowlege and skills. Improve Communicat[ion] Raing-3.

DOCUMENT FROM NYHRD FILE, ENCL. 25 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT N

February 17, 1977

Martha Garland

Investigation on January 14, 1977 — Chem. Const. Corp.

Navin Shahs personnel folder was not available, his file is in New Orleans, La.

Mr. Kramer M. and E. Paul were also investigated.

EXHIBIT L

September 17, 1976

Mr. Steenland

Reply on September 8, to the ads.

The Eng. we require are project and process types and you'll note in the attached copy of the ad we spell the requirements for both of these. Mr. Kremer never functioned in either capacity while with Chemico. [The ad does not only concern employees who previously worked with Chemico in this field.]

DOCUMENT FROM NYHRD FILE, ENCL. 26 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT F

In Mr. Kremers immidiate department [153] it appears that he was the only Jewish employee in that department. However in the piping departments [200, 240, 241, 242] they were to the best of ouir knowledge seven other Jewish employees.

1. Frank Muller
2. Jacob Stern
3. Sidney Zabaek
4. W. Lindstrom
5. Frank Elstner
6. Gerry Krodman
7. Ernest Schieferstein

Mr. Frank Muller and Mr. R. Kremer were the only Jewish employees terminated in the piping department on August 1, 1975. Both of these men had a short term of service with Chemico. The other six Jewish employees all had longer years of service with Chemico and were retained.

EXHIBIT I

Dr. Gibian to Mr. Coleman, [I can not read it]

Please handle 12/3/75

Don Steenland/ pls reply specifically. 12/17/75

DOCUMENT FROM NYHRD FILE, ENCL. 27 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Exhibit A

On August 1, 1975 the following employees were in the Process Analytical Engineering Department (153)

Dpt. 153	Date of Hire	Date of Birth
Karl Hou	1/8/60	6/6/19
Rubin Kremer	6/25/73	11/23/17
B. R. Kumar	4/30/73	5/30/45
Emerson Paul	6/25/56	6/7/19
James Puc	6/13/60	12/27/34
Nasser Razfar	4/16/73	8/24/42
Navin Shah	10/26/72	6/30/47
Dpt. 200		
Gianni Ralph	8/30/70	
Padradiaggro A.	10/10/54	
Elsmer Frank	"Manager Drafting."	

Dpt 240
20 empl.

Dpt 241
4 employees.

Dpt. 242
5 empl.

DOCUMENT FROM NYHRD FILE, ENCL. 27 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Exhibit A

On August 1, 1975 the following employees were in the Process Analytical Engineering Department [Dpt. 153]

	Date of Hire	Date of Birth
Karl Hou	1/8/60	6/6/19
x Rubin Kremer	6/25/73	11/23/17
x B. R. Kumar	4/30/73 [false]	5/30/45
Emerson Paul	6/25/56 [false]	6/7/19
Jamez Puc	6/13/60	12/27/34
Nasser Razfar	4/16/73	8/24/42
x Navin C. Shah	10/26/72	6/30/47

Dpt. 200, 240, 241, 242 [false]

EXHIBIT B

Nov. 1 1975 or 1976 Air Polution Control sold to Envirotech.

DOCUMENT FROM NYHRD FILE, ENCL. 28 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

ANSWERS TO COMPLAINANTS ALLEGATIONS [Investigation Report]

Allegation No. 1.
Respondent agreed that complainant was employeed on June 25, 1973 as an Engineer. However they disagreed he was terminated. They stated he was *laid off along with 13 other employees who were in the Process Analytical* Eng. Dpt. [See Evaluation of performance May 27, 1976... *Mr. Kremer was let go with two others engineers ... opinion of* Mr. Puc]

Allegation No. 2.
Respondents contended that Chemical Construction Corp. was experiencing some major cutback in projects. As a result the Piping Analytical force was cut 50%. Mr. Kremer was let go with two other engin. One of the two engineers who was let go from the Piping Analytical force was rehired. In addition, an engineer from *the Mechanical Dept. was rehired to complete the work on Russian Ammonia plants. Mr. Kremer was not rehired because the projects he had worked on was completed* [Exh. D, C, - False]

Allegation No. 3.
Respondents disagreed that Chemical Const. Corp. hired those persons younger than 58, The Corporation has not hired any new employees fifty years of age and older since complainant was terminated, however Exhibit E shows 37 people employed by respondents are 50 years of age and older. According to Exhibit F the piping department has five sections namely: 200, 241, 240, 242, and 153. Mr. Kremer was employed in section 153 and in fact he was the only Jewish employee in that department. However the records shows that the piping department collectively employs seven other Jewish employees and an additional..... [There was no Piping Department on August 1, 1975]

KREMER LETTER OF DECEMBER 4, 1977, ATTACHMENT 5 TO COMPLAINT

December 4, 1977

Rubin Kremer
c/o R. Garkowe
2120 Wallace Ave., Apt 2B
Bronx, New York, N.Y. 10462

Tel.—[212]-892 1322

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No: TNY 6 — 1526
Re: Chemical Construction Corporation

Dear Mr. Stern:

On May 20, 1976 based on the instructions in your letter of May 7, 1976 I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against me by refusing to reemploy as a piping analytical engineer because of age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

After the filing of the complaint on May 20, 1976 the following proceeding ensued:

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place.

2. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Sttenland, Personnel Director of Chemico, conducted before Martha Garland, a

Field Representative of the Human Rights Division took place. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false. The Field Representative failed to include in her "Complainants Rebuttle" the basic information surrounding my termination. Respondent did not attend this review.

3. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. I informed the Director of the H.R.D., between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab Boycott. After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age". There is no record in the file that this investigation took place.

4. Mr. George C. Findlay, Regional Director of the Human Rights Division, during a brief appointment at the end of March, 1977 stated, "Your case looks favourable". There is no record in the file that this appointment took place.

5. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed my complaint on the ground that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

6. The following people were hired and rehired in the Piping Analytical Department 153 of Chemical Process Plant Co. [CPPC] in August 1975.

   — Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Dept. 153 of CPPC, and did not work on the Russian ammonia job [2008].

   — Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

   — Mr. Tapan Ranerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Dpt. of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

— Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

7. Based on Dr. Th.G Gibians statement of September 24, 1975 and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

— on November 2, 1975,	Ad. on Nov. 2, 1975
— on May 21, 1976,	Ad. on May 16, 1976
— on July 16, 1976,	Ad. on July 11, 1976
— on August 15, 1976,	Ad on August 15, 1976
— on September 8, 1976	Ad. on September 5, 1976

All the positions advertised correspondet exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

8. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others, "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

9. Mr. John Puc former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excelent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties".

There were never complaints from the Project Manager of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well as in other departments to whom we released information for further performance.

10. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve comunicat." One month later on July 29, 1975 in order to remove me from the Company my performance rating became "Below Average". It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

11. By notice dated May 10, 1977, I appealed the Human Rights Division determination to the State Human Rights Appeal Board. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

    It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977.

    The Appeal Board did not examine the witnesses listed on page 5 in my brief.

12. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules. This determination and order dismissing th complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice.

Therefore I ask the United State Equal Opportunity Commission to reconsider this case in accordance to the compulsory law in the United States of America.

Sincerely,

B. Kremer

CHEMICO LETTER OF SEPTEMBER 5, 1975,
ENCL. 4 TO KREMER LETTER OF JUNE 5 , 1978,
ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation

An Aerojet-General Company

One Penn Plaza
New York, N. Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

September 5, 1975

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

This is to inform you that in follow up to our conversation I am proceeding to investigate the facts surrounding your termination. I have spoken with several people in Chemico and right now there does not appear to be an opening which would require your background. I will continue to investigate possibilities though, and as promised will be in touch with you in the near future with more details.

Sincerely,

/s/J. Kevin Coleman
Vice President
Employee Relations

JKC:bm

EEOC LETTER OF JUNE 27, 1978, ATTACHMENT 4 TO COMPLAINT

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1307
New York, New York 10007
264-7161

June 27, 1978

Mr. Rubin Kremer
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, New York 10462

Re: *Rubin Kremer v. Chemical Contruction Corp.*
Charge No. 021-76-1526

Dear Mr. Kremer:

I am in receipt of your letter of June 15, last, in which you request reconsideration of the Determination rendered in the above-captioned matter.

Section 1601.19b(d) of the Commission's Procedural Regulations provides in pertinent part as follows:

> ...The determination is final when issued; therefore request for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at anytime and, when it does so the Commission shall promptly notify the aggrieved person or the person making the charge on behalf of the aggrieved person where applicable, and the respondent...of its subsequent decision or reconsideration.

I have reviewed the case file, and have spoken at length with the investigator, with particular emphasis upon the points contained in your communication, and have concluded that the Determination as rendered is appropriate and correct in all respects. Therefore, in conformity with Section 1601.19b(d), your request for reconsideration is not granted.

Sincerely,

/s/ Aruthur W. Stern
District Director

KREMER PETITION FOR REVIEW, DECEMBER 6, 1978

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
FIRST JUDICIAL DEPARTMENT

RUBIN KREMER

Petitioner,

-against- *PETITION*

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD,
and CHEMICAL CONSTRUCTION CORPORATION,

Respondents.

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

Petitioner, Rubin Kremer, respectfully alleges:

1. Petitioner was employed by Chemical Construction Corporation as a piping analytical engineer from June 25, 1973 until August 1, 1975.

2. Petitioner was told that he was laid off due to lack of work. In August of 1975, petitioner learned that several people were hired and rehired in the piping analytical department

3. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Co. [CPPC] in August 1975.

-Mr. Parish Shah, age about 25-27, was hired on August 8, 1975, He did not work previously in the Piping Analytical Department 153 of CPPC, and did not work on the Russian ammonia job [2008]

-Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

-Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

-Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

4. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of Employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down. There was no lack of work in this area in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, John Puc and E. Paul to remove me from the Company on August 1, 1975. Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

5. I am 60 years of age and of Jewish faith. The people hired and rehired are much younger than I, and previous to my being laid off I was the only Jewish person in the piping analytical department.

6. Mr. Don Steenlands statement that respondent's Company *presently* [August, 1976] has 25 Jewish people on the payroll could not prevent Mr. E. Pauls action to remove me from the Company on August 1, 1975, accepted by the Management of Chemical Construction Corporation.

7. On August 22, 1975, petitioner applied to the President of Chemical Construction Corporation, Dr. Thomas G. Gibian for reinstatement as a piping analytical engineer, but such application was rejected.

8. Dr. Thomas G. Gibian, President of Chemico in his letter to the petitioner of September 24, 1975 stated, "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel." Mr. J. Kevin Coleman, Vice President of Employee Relations and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

9. Based on Dr. Th.G. Gibians statement and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

-on November 2, 1975,	Ad. on November 2, 1975
-on May 21, 1976,	Ad. On May 16, 1976
-on July 16, 1976,	Ad. on July 11, 1976
-on August 15, 1976,	Ad. On August 15, 1976
-on September 8, 1976,	Ad. On September 5, 1976

All the positions advertised correspondet exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

10. Mr. John Puc, former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical enginner with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties." There were never complaints from the Project Management of my "slowness." On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

11. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve communicat." One month later on July 27, 1975 in order to remove me from the Company my performance rating became "Below Average." It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

12. On May 6, 1976 petitioner filed a charge of discrimination against Chemical Construction Corporation, with the United States Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964; and said Commission, pursuant to Section 706/b/ of such Act, referred the matter to the Division of Human Rights of the State of New York.

13. On May 20, 1976 petitioner filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against him by refusing to reemploy him as a piping analytical engineer because of his age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

14. After the filing of the aforsaid complaint on May 20, 1976, the following proceeding ensued:

a) Pursuant to notice from the State Division of Human Rights of July 30, 1976 the Conference for Conference and Production of Records on August 12, 1976 did not take place.

b) On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, conducted before Martha Garland, a Field Representative of such Division. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false [Exhibits C,D,F and H]. The Field Representative failed to include in her "Complainants Rebuttal" the basic information surrounding my termination.

c) On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. During this investigation I informed her, between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab boycott.
After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age.
There is no record in the file that this investigation took place.

d) Mr. George C. Findlay, Regional Director of the Human Rights Division during a brief appointment at the end of March, 1977 stated "Your case looks favorable."
There is no record in the file that this appointment took place.

e) By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed petitioner's complaint on the ground that "The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant."

f) Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

g) By notice dated May 10, 1977, petitioner appealed said determination to the State Human Rights Appeal Board.

h) After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

i) It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain petitioners brief to the Appeal Board dated May 10, 1977.
The Appeal Board did not examine the witnesses listed on page 5 said brief.

15. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constitued final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules.

16. Said determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice, since it did not begin to run until after the denial of reinstatement.

17. By virtue of the aforesaid, petitioner was deprived of the compensation he would have received has he been reinstated, together with the normal increments to such compensation, and he has suffered damages thereby in the amount of about FORTY THOUSAND AND 00/100 DOLLARS and accrued interest.

18. The aforsaid acts on the part of CHEMICAL CONSTRUCTION CORPORATION, discriminated against petitioner by reason of his age and creed in violation of Section 296 of the Human Rights Law of the State of New York.

19. The petitioner is entitled to be reinstated as a piping analytical engineer or equal with Chemical Cosntruction Corporation, and he is wrongfully and unlawfully being denied right to such employment, and petitioner continues to be wrongfully denied the said right, unless this Court annul the determination of the said Division of Human Rights and the order of the said Human Rights Appeal Board, and compel CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner, as such engineer.

20. No previous application for the relief sought herein has been made to any court or judge.

WHEREFORE, petitioner prays that a final judgment be made and entered herein, reversing, annulling and setting aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner as an piping analytical engineer or equal and that petitioner be so reinstated, and that petitioner be awarded damages in the amount of about FORTY THOUSAND AND 00/100 [$40,000] DOLLARS and accured interest; and for such other and further relief as is just and proper, together with the costs and disbursement of this proceeding.

Dated: December 5, 1977
New York, New York

/s/ Rubin Kremer
Petitioner

STATE AND COUNTY OF NEW YORK / SS.:

Rubin KREMER, being duly sworn, deposes ad says that he is the petitioner in the within action; that deponent has read the foregoing petition and knows the contents thereof; that the same are true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

/s/ Rubin Kremer
Petitioner

Sworn to before me this
6 day of Dec., 1977

/s/ Irving Goldberg
Notary Public

IRVING GOLDBERG
Notary Public, State of New York
No. 4630618
Qualified in Westchester County
Commission Expires March 30, 1978

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 29C.F.R. §1601.12 Deferrals to State and local authorities

"....

"(c) 706 Agency Defined: For the purposes of this section and § 1601.10, the term "706 Agency" shall refer to an agency to which a charge is deferred. A State or local agency may be granted 706 Agency status for certain bases of discrimination and not for others. A charge shall be deferred where a State or a political subdivision of a State has a State or local law prohibiting the unlawful employment practice alleged, and said State or local law authorizes a State or local agency to grant or seek relief from the unlawful employment practice alleged or to institute criminal proceedings with respect thereto, and such State or local agency has been established and, at the time the charge is submitted to the Commission, is operational and processing charges filed under the State or local law.

(f) Because of the large number of State and local fair employment practice agencies, only those agencies which notify the Commission of their qualifications under subsection (c) of this section and request designation as "706 Agencies" or "Notice Agencies" or both will be eligible for such designation. Such notification must be submitted by written request to the Commission's Regional Director in whose region the State or local agency is located. The request shall include the following materials and information:

"....

" (5) A statement certifying the following:

(i) That the State or political subdivision has a fair employment practice law;

(ii) That such law authorizes the applicant agency or authority to grant or seek relief from employment practices found to be illegal under such law or that it authorizes the agency to institute criminal proceedings;

(iii) That such agency or authority has been established and is operational and processing charges filed under such law.

"....

" (j) Performance Standards: The continued designation of a 706 Agency will be dependent upon the 706 Agency's willingness and ability to administer its law in such a manner that, in fact, the practices prohibited are comparable in scope to those practices prohibited under Federal law and satisfy the performance standards set forth below:

(1) In all cases where the 706 Agency finds cause to credit the allegations of a charge, it shall effectively eliminate the discrimination and, where State or local law allows, provide for full compensatory and prospective relief consistent with applicable Federal law."

NEW YORK STATE HUMAN RIGHTS LAW

N.Y. EXEC. LAW § 296. Unlawful discriminatory practices

"1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

N.Y. EXEC. LAW § 297. Procedure

"....

"2. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent."

N.Y. EXEC. LAW § 297-a. State human rights appeal board

"1. There is hereby created in the executive department a state human rights appeal board, in this article referred to as the board, consisting of four members appointed by the governor, by and with the advice and consent of the senate. No more than three members shall be from the same political party."

N.Y. EXEC. LAW § 298. Judicial review and enforcement

"Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record of all prior proceedings and the issuance and service of a notice of motion returnable before such appellate division of the supreme court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the

appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. The appeal shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of such order."

RULES OF PRACTICE AND PROCEDURE OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

9 N.Y.C.R.R. § 465.6 Investigations

"(a) Investigation

After the filing of a complaint, the regional director of the division office in which it was filed, or to which it has been transferred, shall make, with the assistance of staff, a prompt and fair investigation of the allegations of the complaint.

(b) Methods

Such investigation may be made by field visit, written or oral inquiry, conference, or any other method or combination thereof deemed suitable in the discretion of the regional director or the director of regional affiars.

(c) Rebuttal

The complainant shall have an opportunity to rebut evidence submitted by or obtained from the respondent, before any determination dismissing a complaint for no probable cause is made by the regional director."

9 N.Y.C.R.R. § 465.12(c) Application for a subpoena. Subpoenas and subpoenas duces tecum may be issued by the designated division officers and employees upon the application of a party or party's attorney. Issuance of a subpoena *duces tecum* at the instance of a party who appears without attorney shall depend upon a showing of necessity.

KREMER NYHRD COMPLAINT, ENCL. 1
TO KREMER LETTER OF JUNE 15, 1978,
ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK –
DIVISION OF HUMAN RIGHTS
COMPLAINANT'S INFORMATION SHEET
_____ REGIONAL OFFICE

COMPLAINANT:

RESPONDENT:

I, /s/Rubin Kremer, the complainant in the above matter acknowledge the following:

____1. I have been advised that according to the Division's Rules of Practice:

a. The Division or I shall be able to reasonably amend my complaint;
b. This complaint may be withdrawn by me at any time before the service of a Notice of Public Hearing
c. Upon my application, or on his own motion, the Commissioner may reopen the proceedings after this matter has been closed
d. If this matter is conciliated, I will be given fifteen days in which to agree to or object to the terms of conciliation
e. I may be present and shall be allowed to present testimony in person or by counsel and cross-examine witnesses in a Public Hearing on this matter.

____2. I have been informed that a copy of my complaint and/or the determination in this matter will be sent to _____, The local human rights commission, or referral agency of my choice.

____3. I have been informed of my right to retain private counsel.

____4. a. I understand that I, or my attorney, may review the Division's file in this matter.

b. I also understand that I, or my attorney, may copy by hand any material in the file.

____5. I am to notify the Regional Office of the Division of any change in my address, telephone number, or place of employment which may occur during the course of the Division's handling of this matter.

____6. Except for emergency situations, I shall give the Division's Regional Office four days' notice in the event that I cannot attend any scheduled conference at which my presence has been requested.

____7. I acknowledge receipt of a copy of the complaint in the above entitled matter.

Date: May 25, 1976

/s/Rubin Kremer
Complainant's Signature

KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., 2B
Bronx, New York, N.Y. 10462
Tel.: [212]-892-1322

June 15, 1978

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No.: TNY 6 - 1526
021 - 76 - 1526
Re: Chemical Construction Corporation

Dear Mr. Stern:

I would like to ask you to reconsider and to annul the Determination of the EEOC dated May 11, 1978, and to reopen this case on the grounds that the foundings and proceder was not impartial.

1. On May 20, 1976 based on the instructions in your letter of May 7, 1976, I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York [Encl. No.1] alleging that Chemical Constr. Corporation unlawfully discriminated against me by laying me off without reason, and by refusing to reemploy me as a piping analytical engineer because of my religion and age, in violating of Section 296 of the Human Rights Law of the State of New York.

2. After the filing of the complaint on May 20, 1976 the following proceeding ensued:

   The Conference arranged by the Human Rights Division at 270 Broadway, on August 12, 1976 [Encl. No.2] for

Conference and Production of Records in the New York State H.R.D. did not take place. It was cancelled by the Field Representative of the H.R.D., Ms. Martha Garland.

3. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland Personnel Director of Chemico, conducted before Martha Garland, a Field Representative of the H.R.D. took place [Encl. No.8].

   I verbally refuted all the respondents statements entirely and demonstrated with documents that they are untrue and false [Extr. No.11, Exh.A, Extr. No.6].

   The field representative failed to include in her "Complainant's Rebuttal" [Extr. No.1] the basic information surrounding my termination, e.g. the people hired and rehired in August 1975 in Dept. 153 of CPPC after my termination namely:

   — Mr. Parish Shah on August 8, 1975
   — Mr. Navin Shah on August 10, 1975
   — Mr. Tapan Banerjee about August 23, 1975

   [See also Affidavid of May 6, 1975, File- TNY 6 1526, I was the only person not rehired].

   and the names of employees I worked with in order to proof my performance rating, namely:

   A. Mr. Answat Tankasali — Proj. Engineer
      Mr. Robert Tucker — Proj. Manager
      Job - 1964 Sulfuric Acid Plant for Hecla Mining Corp.

   B. Mr. Roy Ostrom — Proj. Engineer
      Mr. J.V. Bermudez — Proj. Manager
      Job - 1975, Gas part of Sulfuric Acid for Phelps and Dodge.

   C. Mr. Frank Severino — Proj. Engineer
      Mr. Farina — Proj. Manager
      Job - 2001 Sulfuric Acid plant for Korea

D. Mr. James Puc — Supervisor
- Proposal of Ammonia Plant for USSR.
- Review of the USSR Ammonia Job 2008, performed by Norman Razfar and Karl Hou, where I found over 50% errors except unsolved problems. All accepted by Mr. Puc.
- Comparision of three 1500 ton Ammonia plants, built by Chemico to proove the USSR job.

E. Mr. Robert Wendel — Proj. Engineer
Mr. L. Livolsi — Proj. Manager
Job - 2014, Relocation of Ammonia Plant

F. Mr. Michael Kramer — Proj. Engineer of Coalcon
Mr. Robert Tucker — Proj. Manager
Coal Gasification, where I worked before I was laid off, being in the midle of the job, assigned by Mr. E.V. Paul.

During this review Ms. M. Garland urged me "Read faster I have to go for lunch".

Respondent did not attend this review.

BASIS for NO PROBABLE CAUSE [EXTR. NO.2]
by Martha L. Garland, October 6, 1976,

1. "Investigation revealed complainant was laid off on August 1, 1975 from the Process Analytical Engineering Department *along with 14 other employees in his Department*".

   Comment:

   a. - There was no Process Analytical Engineering Dept. on August 1, 1975.
   Reference: Performance Rating by E.V. Paul dated July 29, 1975 [Extr. No.6 and Extr. No.5].

   b. - Mr. Jamez Puc, former supervisor of Dept. 153, in his opinion of May 27, 1976 [Extr.No.4] stated: *"Mr. Kremer was let go along with two other engineers* B.R. Kumar and Navin Shah" *not along with 14 employees in the Department as Ms. Martha*

Garland contendet. Departments 200, 240, and 242 were Drafting Depts. and had a separate Management [Extr.No.5,Extr.No.6]

2. "Investigation revealed ....."
   Comment: I was hired at age over 50. There was a different Management.

3. "Investigation revealed that complainant was the only Jewish employee in his Department, however, respondents Company presently [1976] has 25 Jewish people on the payroll which represents 13% of Chem. Constr. Corp. work force".
   Comment: At the time I worked, Chemico employed over 800 people. The alleged twenty five [25] Jewish Employees of 800 is only about 3%. To my knoledge no Jewish employee has been hired since August 1, 1975. The alleged 25 Jewish employees on the payroll [August, 1976] could not prevent *Mr. E. Paul's action to remove me from the Company on August 1, 1975 by giving me a "below average" performance rating on July 29, 1975 accepted by Chemico — Dr. Th. Gibian — President, and J.K. Coleman — V.P. of Personnel Relations [Extr.No.6,Encl.NO.3,Extr.No.5,Extr.No.7, Encl.No.6]. On June 19, 1975 my performance rating by E. Paul was "Hold for his knowledge and skills"* [Extr.No.8,Exh.D_3].

4. "Investigation revealed ....."
   No comment.

   The Basis for No Probable Cause by Ms. Martha Garland are untrue and tendentious [Extr.No.4, Extr.No.8-Exh.D_4,D_3].

   To my knowledge Ms. Martha Garland investigated sometime in January 77 several people e.g. E.Paul and M. Kramer from Coalcon. However, *there is no record in the file that this people were investigated,* instead there

is a note that she intendet to review Mr. N.Shah's file, but was unable to do so because the file was sent to New Orleans La.[Extr.No.9,Exh.N].

4. On November 9, 1976 I was investigated by Ms. Lillian Fennel, Regional Director of the Human Rights Division [Excl.No.7]. I submitted verbally to the Director all the information listed above. In addition I informed the Director, that to my knowledge Chemico signed the Anti-Jewish and Anti-Israeli Arab Boycott Agreement.

   After this investigation Ms. Fennel stated: "We are going to ask Chemico to send to us a list of employees hired from August 1, 1975 up to date. We will talk to the people you worked with in order to prove your performance rating. We would like to talk to the former Vice President of Engineering who hired you on June 25, 1973. We will ask the actual Vice President of Engineering Mr. L. Livolsi why you could not be rehired in August 1975. [I asked personally Mr. Livolsi on August 19, 20, and 21 for rehire. The answer was, "I am too short hear to rehire you", but was long enough to rehire and hire others. I worked on the 2014 Job and Mr. livolsi was at that time the Project Manager]. We will check your statement concerning the Anti-Jewish and Anti-Israeli Boycott in our Office, [H.R.D.]," and finally Ms. Fennel stated "You were fired because you are Jewish not because of your age".

   After the investigation I met Ms. Garland in the elevator, she stated "She [Ms. Fennel] gave me everything back. *There is no record in the file that this investigation took place.*

5. In a determination dated April 28, 1977 the State Division of H.R., by George C. Findlay, Regional Director dismissed my complaint on the grounds that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

See also point 6, 7, 8, 9, and 10 of my letter to Mr. Arthur W. Stern, District Director of EEOC, dated December 4, 1977, File No. TNY 6 - 1526. I was systematically refused to review the file.

6. NEW YORK STATE APPEAL BOARD. By notice dated May 10, 1977 I appealed the Human Rights Division determination to the State Human Rights Appeal Board. [Encl.No.11].

   After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977, the order appealed was affirmed.

   It should be noted that:

   — The Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977, and he could not read it before the hearing.

   — *The Appeal Board did not examine the wittnesses listed on page 5 of my brief dated May 10, 1977.*

   — *There is no record in the file containing the exchange of arguments between the parties.*

7. SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FIRST DEPARTMENT [Encl.No.12, No.13, No.14]

   Based on the Order of the State Human Rights Appeal Board - Appeal No. 4151, dated November 25, 1977 I appealed to the N.Y. State Supreme Court.

   By Petition dated December 5, 1977 I appealed to the Appellate Division of the New York State Supreme Court, praying to set aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling Chemical Construction Corporation, to reinstate me as a piping analytical engineer or equal and to be awarded damages for the time I was unable to get a job.

By order dated February 27, 1978 [Encl.No.15] the determination of the State Division of Human Rights, and the order of the order of the State Human Rights Appeal Board was affirmed.

A review of the file 1877 [M-4560] in the Supreme Court on March 16, 1978 and on May 26, 1978 revealed:

— *There was newer a hearing of the parties before the N.Y. State Supreme Court on this matter as the order contends.*
Witness: Messr Layton and Sherman.

— There is no record in the file that a term of the Appellate Division of the Supreme Court took place.

— There is no copy or original of the order dated New York, February 27, 1978 in the file.

— The file does not contain the certified record of administrative proceedings submitted to the Supreme Court by the Office of General Councel to the State Division of Human Rights, dated December 15, 1977 by Alan J. Saks, Associate Attorney [Encl.No.16].

8. As the forgoing facts demonstrate, the Order of the New York State Appeal Board, dated November 25, 1977 and the Determination of the New York State H.R. Division, dated April 28, 1977 should be set aside so long as the findings and the order of the Division and the Board were arbitrary and not impartial.

Therefore I ask the Equal Employment Opportunity Commission the following:

1. To reconsider the Determination of the EEOC, dated May 11, 1978.
2. To reopen this case.
3. To examine the following witnesses in my presence in the order listed on page 8, 9, and 10.
4. To order me reinstated as a piping analytical engineer or equal.

5. To award damages for the time I was unable to get a job.

Sincerely,

/s/R.Kremer

Enclosures:

1. List of witnesses, page 8, 9, and 10.
2. List of enclosed documents, page 11.
3. To examine the following witnesses in my presence in the order listed on page
   1. Mr. Jamez Puc, former Supervisor of Dept. 153

      Barnard and Burk, Inc.
      200 Sheffield St.
      Moutainside, New Jersey 07092

      to prove:
      — that on July 28, 1975 I was assigned by E. Paul to work with Coalcon on the Coal Gasification Project.
      — that there was no lack of work in the piping analytical area in Dept. 153 on August 1, 1975
      — his statement concerned my performance rating and other remarks in his opinion of May 27, 1976 [Extr.No.4].
      — that in August 1975 the following people were hired in Dept. 153.
      Mr. Parish Shah
      Mr. Navin Shah
      Mr. Tapan Barnerjee

   2. Mr. E.V. Paul, former Superior of Depts 153, 241, and 242.

      Stone and Webster, Inc.
      One Penn Plaza
      New York, N.Y. 10001

to prove:
- that on July 28, 1975 Mr. E. Paul assigned me to work with Coalcon on the Coal Gasification Project, and that there was no lack of work.
- his statement concerned my "below average" performance rating on July 29, 1975 [Extr.No.6].

3. Mr. Carls, Vice President of Coalcon

Coalcon
One Penn Plaza
New York, N.Y. 10001

to prove:
- that on August 1, 1975 there was no lack of work in the piping analytical area on the Coal Gasification Project.
- that on July 31, 1975 Coalcon sent a list of employees to the Management of Chemico whom Coalcon wanted to continue their work, and that I was on this list.

4. Mr. L. Livolsi, former Vice President of Engineering

Nicholts Engineering
Princeton, New Jersey

- to explain why I could not be rehired in August 1975. In the same time three employees were hired in Dept. 153.
- to evaluate my performance rating while I was working on the Job-2014, Relocation of Ammonia Plant. Mr. Livolsi was the Project Manager of this Job.

5. Mr. J. Kevin Coleman, Vice President Employee Relations

Chemical Construction Corporation
One Penn Plaza
New York, N.Y. 10001
- to explain his statement in his letter dated September 15, 1975 [Encl.No.5], and his note to Dr. Gibian [Extr.No.7].

— to explain why I was laid off, despite that I was on the list which Coalcon sent to Chemico on July 31, 1975.

6. Dr. Thomas G. Gibian, former President of Chemico

Technical Guidance International, Inc.
475 Steamboat Road
Greenwich, CT 06830

— to explain the lay off and rehire criteria in August 1975.
— to explain his statement in his letter dated September 24, 1975 [Encl.No.6] in response to my letter dated August 22, 1975 [Encl.No.3]
— to disclose his investigation in September 1975 concerned my performance rating.

7. Mr. Don Steenland, Personnel Director

Chemical Construction Corporation
One Penn Plaza
New York, N.Y. 10001

to prove:
— the statements in the exhibits submitted to the New York Human Rights Division, 270 Broadway, dated August 11, 1976.
— his statement in his letter to the N.Y.H.R.D. dated September 17, 1976 [Extr.No.4]

8. Mr. Parish Shah, Employee of Dept. 153

Pullman Kellogg
433 Hackensack Ave.
Hackensack, N.J. 07601

— to prove that he was hired in August, 1975 in Dept. 153 of CPPC and to disclose the circumstances of his hiring.

9. Mr. Tapan Barnerjee, Employee of CPPC

   Pullman Kellogg
   433 Hackensack Ave.
   Hackensack, N.J. 07601

   to prove that he was hired in August, 1975 in Dept. 153 of CPPC, and to disclose the circumstances of his hiring.

10. Mr. Navin Shah, Employee of Dept. 153

    Chemical Construction Corporation
    One Penn Plaza
    New York, N.Y. 10001

    to prove that he was rehired [his lay off was cancelled] in Dept. 153 in August, 1975 an the circumstances of his rehire.

11. Mr. Krishma Raj, Employee of Dept. 241

    Chemical Construction Corporation
    One Penn Plaza
    New York, N.Y. 10001

    to prove that he was rehired [his lay off was cancelled] in Dept. 241 of CPPC in August, 1975 and the circumstances of his rehire.

12. Ms. Audrey Charrow, former Personnel Employee of CPPC

    Envirotech
    Chemico Air Pollution Controll
    One Penn Plaza
    New York, N.Y. 10001

    to disclose the basic circumstances surrounding the rehiring of the Employees listed in points 8, 9, 10, 11.

List of enclosed documents.

1. Encl. No.1 — Complaint, N.Y.S.H.R.D.
2. Encl. No.2 — Notice of Conference, H.R.D. August 12, 1976
3. Encl. No.3 — Letter of August 22, 1975, Chemico
4. Encl. No.4 — Letter of September 5, 1975, Chemico
5. Encl. No.5 — Letter of September 15, 1975, Chemico
6. Encl. No.6 — Letter of September 24, 1975, Chemico
7. Encl. No.7 — Message from N.Y.S.H.R.D., dated 10/27/76
8. Encl. No.8 — Letter from the H.R.D., dated August 18, 1976
9. Encl. No.9 — Letter to the H.R.D., dated February 25, 1977
10. Encl. No.10 — Letter to the H.R.D., dated May 3, 1977
11. Encl. No.11 — Letter to the State H.R. Appeal Board, May 10, 77
12. Encl No.12 — Petition to the N.Y.S. Supreme, December 5, 1977
13. Encl. No.13 — Memo of Law in Opposition to Petitioner, Dec. 21, 1977
14. Encl. No.14 — Reply to Respondents Memo of Law, Dec. 28, 1977
15. Encl. No.15 — Order of the Supreme Court, February 27, 1978
16. Encl. No.16 — Letter of the S.D.H.R. to the Supreme Court, 12/15/7
17. Encl. No.17 — Letter of June 10, 1976, Chemico
18. Extr. no.1 — Rebuttal
19. Extr. No.2 — Basis for No Probable Cause, October 6, 1976
20. Extr. No.4 — Exh.L, Exh.D_1
21. Extr. No.5 — Interoffice Correspondence - Chemico, June 17, 1974
22. Extr. No.6 — Performance Rating, Piping Engineering, 7/29/75
23. Extr. No.7 — Note from K.J. Coleman to T.G. Gibian, September 15, 197
24. Extr. No.8 — Exh.C, Exh.D_2, Exh.D_3, Exh.D_4.

25. Extr. No.9 — Exh.N, Exh.L
26. Extr. No.10 — Exh.F, Exh.I
27. Extr. No.11 — Exh.A
28. Extr. No.12 — Answers to Complainants Allegation, August 11, 1976